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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1241
Petitioner, Owens-Illinois, Inc.

No. 92-1471
Petitioner, The Celotex Corporation

No. 92-1474
Petitioner, Fiberboard Corporation

No. 92-1502
Petitioner, Garlock, Inc.
v.
Respondents in All Cause Nos., Ruben S. Pool, *et. al.*

RESPONDENTS' BRIEF IN OPPOSITION

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No. 92-1241
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,
V.
REUBEN S. POOL, *et. al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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No. 92-1471
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THE CELOTEX CORPORATION,
Petitioner,
V.

REUBEN S. POOL, *et. al.*,
Respondents.

Petition for a Writ of Certiorari to The Court of Appeals for the Sixth Supreme Judicial District of Texas at Texarkana

No. 92-1474
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

FIBREBOARD CORPORATION,
Petitioner,
V.

REUBEN S. POOL, *et. al.*,
Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals of Texas
Sixth District

No. 92-1502
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GARLOCK, INC.,
Petitioner,
V.

REUBEN S. POOL, *et. al.*,
Respondents.

Petition for Writ of Certiorari
to the Court of Appeals for the
Sixth Supreme Judicial District,
Texarkana, Texas

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to consider the questions presented by the Petitioners when these questions were not properly presented to the Courts below?

2. Whether the Texas common law system of assessing and reviewing punitive damages violates due process when the underlying award is admittedly supported by sufficient evidence and is not excessive?

3. Whether the potential of future awards of punitive damages violates due process and forecloses the right of the Respondents to recover an otherwise proper punitive damage award?

4. Whether or not the complete factual review of the evidence by the Texas appellate courts resulted in a denial of due process to Petitioner, Garlock?

LIST OF PARTIES

DEFENDANTS:

Owens-Illinois, Inc. (Petitioner, No. 92-1241)
Celotex Corporation (Petitioner, No. 92-1471)
Fibreboard Corporation (Petitioner, No. 92-1474)
Garlock, Inc. (Petitioner, No. 92-1502)

PLAINTIFFS IN CIVIL ACTION NO. 86-363 (Respondents herein):

Reuben S. Pool
Lee Pool
Charles Strong
Nancy Strong
Thomas Sledge
Betty Sledge
Bobbie Freeman
Donna Freeman
Ollie Freeman

PLAINTIFFS IN CIVIL ACTION NO. 88-08-293 (Respondents herein):

Lessie L. Williams
Ralph E. Williams
Robert E. Williams
Carrol A Purdy
Murry W. Williams
Cindy L. Powdrill
Bobbie S. Phillips
Emory G.L. Williams
Patsy R. Fountain

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No. 92-1241

Petitioner, Owens-Illinois, Inc.

No. 92-1471

Petitioner, The Celotex Corporation

No. 92-1474

Petitioner, Fibreboard Corporation

No. 92-1502

Petitioner, Garlock, Inc.

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The petitions for writ of certiorari and this brief in opposition stem from a single trial held in the 4th Judicial District Court of Rusk County, Texas, on October 2, 1989 through October 19, 1989. Civil Action No. 86-363 (the *Pool* plaintiffs) was consolidated with Civil Action No. 88-08-293 (the *Williams* plaintiffs) and the cases were tried together. Petitioners herein appealed to the intermediate Texas appellate court, the Texarkana Court of Appeals. The Texarkana court set aside $100,000 in future medical expenses for one of the plaintiffs, set aside all exemplary damages assessed against Petitioner Garlock, and affirmed the remainder of the trial court judgment--this decision is reported in *Fibreboard Corp. v. Pool*, 813 S.W.2d 658 (Tex. App.--Texarkana 1991, writ denied).

The Petitioners then filed separate applications for writ of error to the Supreme Court of Texas. The Supreme Court of Texas initially granted the applications for writ of error on April 29, 1992 and, after receiving the Respondents' brief in opposition, heard oral argument on the applications. The Supreme Court of Texas later withdrew its order granting the applications, holding that the applications had been improvidently granted, and then denied all of Petitioners' applications for writ of error.

GROUNDS FOR JURISDICTION

The Supreme Court of Texas entered its Order denying the Petitioners' applications for writ of error on November 11, 1992, and overruled all of the Petitioners' motions for rehearing on December 9, 1992. Petitioners allege jurisdiction in this Court pursuant to 28 U.S.C.A. § 1257 (1992). However, Respondents contest this alleged jurisdiction because:

1. Petitioners did not challenge the amount of the punitive damage award as excessive, nor did they challenge the evidence supporting the award of punitive damages. Therefore, Petitioners have waived any procedural due process challenge to the Texas common law method of review of punitive damages under *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991);
2. Petitioner Garlock's "Fourteenth Amendment due process challenge" is nothing more than a thinly-concealed attempt to persuade this Court to improperly consider and rule on *evidentiary* matters that are wholly within the province of the Texas courts who have heard this case; as such, Garlock's petition does not invoke the jurisdiction of this Court.

Garlock has previously urged only "no evidence" and "insufficient evidence" points of error on appeal, and the Texas courts have held that "there was sufficient evidence to support the findings against Garlock. These [Garlock's] points of error are overruled." *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687-688 (Tex. App.--Texarkana 1991, writ denied). Moreover, Garlock admits that it "did not specifically frame its no evidence challenge in the state courts in terms of the denial of due process under the Fourteenth Amendment," yet unabashedly represents to this Court that "Garlock's challenge to the plaintiffs' *lack of evidence*, though not explicit, has always been a due process challenge." Garlock's Petition for Writ of Certiorari, pages 3-4 (emphasis added). Garlock's petition certainly presents nothing for review by this Court; and

3. Petitioners have waived any potential substantive due process challenges and/or have not presented this Court with an adequate record for review with regard to their substantive due process arguments (*see* Reason No. II herein for denying the petitions).

CONSTITUTIONAL PROVISIONS INVOLVED

The petitions and this brief in opposition involve the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This is a product liability lawsuit for death and disease to five working men as a result of exposure to asbestos contained in products manufactured by the Petitioners. The basis of the lawsuit is strict liability for failure to warn of the known risks of exposure to asbestos. Each of these men worked as insulators or mechanics doing insulation and insulation repair work. During their careers, they worked with numerous products that contained asbestos made by these Petitioners and were never warned or told of the dangers associated with the use of the products. The diseases associated with exposure to asbestos include pleural changes, asbestosis, lung cancer, gastrointestinal cancer and mesothelioma. Respondents, Strong, Sledge and Pool developed pleural changes and asbestosis. Respondents, Williams and Freeman died of lung cancer.

This appeal involves specific jury findings of misconduct by the defendants and individualized harm to specific individuals. Petitioners, Owens-Illinois, Celotex, and Fibreboard did not challenge the amount of the punitive damage award as being excessive or unreasonable, in relation to the amount of actual damages awarded, before the Texas appellate courts. Petitioners, Owens-Illinois and Celotex did not challenge the sufficiency of the evidence to support the award of punitive damages.

Petitioners, Fibreboard and Garlock did challenge the sufficiency of the evidence to support the punitive damage award before the Texas Court of Appeals (at Texarkana). After reviewing all of the evidence, the Court of Appeals affirmed the verdict against Fibreboard and reversed the punitive damage award against Garlock. Fibreboard chose not to present an evidentiary challenge to the punitive damage award before the Texas Supreme Court.

The Texas Supreme Court initially granted writ of error for each of these Petitioners. Following oral argument, the Texas Supreme Court entered an Order on November 11, 1992 stating that the writ of error was improvidently granted and, thus, affirmed the actual and punitive damages against Owens-Illinois, Celotex, and Fibreboard. The Order also affirmed the actual damages award against Garlock.

These petitions for writ of certiorari challenge the punitive awards against Owens-Illinois, Celotex and Fibreboard and the actual damages awarded against Garlock. The questions presented by Petitioners Owens-Illinois, Celotex, and Fibreboard have been previously reviewed by this Court, and petition for writ of certiorari denied, in *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, ____ U.S. _____, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991) and *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 2097, 1099 (5th Cir. 1991), *cert. denied*, _____ U.S. ______, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992).

Contrary to the assertions of the Petitioners, the District Court, Court of Appeals and the Texas Supreme Court carefully reviewed the jury instructions, evidence, and award in light of the *Haslip* opinion. Furthermore, on at least two occasions, *King*, *supra* and *Glasscock*, *supra*, the Fifth Circuit has carefully analyzed the post-trial procedures for review of punitive damage awards by Texas law and found "that the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas system from the simplistic 'passion and prejudice' analysis referred to in *Haslip*." *Glasscock*, *supra*. Clearly, the reversal of the punitive damage award against Garlock by the Court of Appeals illustrates the extent and thoroughness of the review of the Texas common law system. Therefore, this Court should deny these petitions for writ of certiorari.

SUMMARY OF THE ARGUMENT

Petitioners strain violently to liken this case to *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), a case in which this Court recently granted TXO's petition for writ of certiorari. However, a careful analysis of the facts underlying *TXO Production* and the specific issues urged by TXO in its petition soon reveals the fundamental differences in the two cases. Petitioners' reliance on *TXO Production* is misplaced.

Furthermore, Petitioners have waived their procedural due process complaints because they have never claimed on appeal that any of the punitive damage awards assessed against them was excessive, as required by Texas law. Nor have any of the Petitioners ever requested a remittitur of the damage awards. They have, quite simply, failed to properly preserve their procedural due process arguments for review by this Court.

Even assuming the Petitioners' complaints under *Haslip* are properly before this Court, no error is demonstrated under the circumstances of *this* case. Petitioners present only general arguments and commentary about Texas procedures that have repeatedly been deemed constitutional under *Haslip*. Review by this Court concerning the constitutionality of Texas law, with regard to procedural due process and punitive damage awards, has already been denied in at least two prior cases. In addition, the record in this case illustrates clear compliance at all levels with these Texas procedures.

Petitioners have also failed to bring forward a record that might somehow support their substantive due process complaints. The evidence in the record substantiating other punitive damage awards that have actually been paid by Petitioners is almost non-existent. Furthermore, there is no evidence in the record now before this Court proving that the transgressions of Petitioners in this case are the same that occurred in any other case.

At any rate, the substantive due process arguments concerning the unconstitutionality of multiple punitive damage awards have been addressed many times, in favor of Respondents. This Court has similarly denied review of these substantive due process complaints.

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. THE TEXAS COMMON LAW SYSTEM OF ASSESSING AND REVIEWING PUNITIVE DAMAGES DOES PROVIDE SUFFICIENT DUE PROCESS SAFEGUARDS.

Texas common law has embraced the traditional common law approach for assessment of punitive damages. As this Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991):

> "Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable....
>
> "....Since every state and federal court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to

> overturn it."

Id. at 1042, 1043.

A complete review of this record demonstrates that the jury was given: (1) clear, objective criteria for the imposition of punitive damages; (2) the full panoply of procedural protections; (3) instructions describing the purpose of punitive damages as punishment and deterrence; (4) the trial court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review, including the Petitioners' claims of multiple prior damage awards; (5) the Texas Court of Appeals and the Texas Supreme Court conducted full appellate review of the issues presented by the Petitioners.

The record also clearly demonstrates that the Petitioners did not avail themselves of the protections offered by the Texas common law system. The Petitioners did not challenge before the Texas appellate courts the amount of the punitive damage awards. Likewise, the Petitioners did not seek a remittitur of punitive damages. Petitioners, Celotex and Owens-Illinois did not challenge or ask the appellate courts of Texas to review the sufficiency of the evidence or the basis of the award of punitive damages. Petitioner, Fibreboard did raise a sufficiency of evidence challenge before the Texas Court of Appeals but voluntarily chose not to raise an evidentiary challenge to the evidence before the Texas Supreme Court. It is axiomatic that these Petitioners should not be allowed to challenge the sufficiency of the guidelines of review or the application of those guidelines if they fail to allege, complain or even attempt to demonstrate that the underlying award is improper.

In essence, these Petitioners are asking this Court to overturn the Texas system of review when they did not properly avail themselves of the procedural protections offered by Texas courts. Additionally, these Petitioners are asking this Court to overturn a punitive damage award that is admittedly based upon sufficient evidence and is not excessive or unreasonable.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the absence of a specific finding of actual damages. *Nabours v. Longview Savings & Loan Association*, 700 S.W.2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Third, the trial court and appellate court must review the award of the jury for excessiveness. In making that review, the trial court and the appellate court *must* consider at least the following factors: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and, (5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id*. at 910. In addition, this trial court specifically reviewed, by post-trial motions and affidavits, the history of punitive awards as provided by these defendants (Plaintiffs have no way to verify the accuracy of the defendants' statements post-trial). Plaintiffs also verify that in response to questions before the Texas Supreme Court, counsel for Owens-Illinois and Celotex admitted that Owens-Illinois had paid only one punitive damage award of $500,000, and Celotex had paid only one punitive damage award of $175,000. Consequently, as the Fifth Circuit correctly stated in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, _____ U.S. _____, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992), "the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas system from the simplistic 'passion and prejudice' analysis referred to in *Haslip*." *Id*. at 1098-99.

Furthermore, the system of review was utilized successfully by Petitioner Garlock. Garlock successfully challenged the punitive award against it before the Court of

Appeals. Texas clearly meets the test of *Haslip* by placing meaningful restraints on jury discretion and by providing adequate post-trial review.

A. THE QUESTIONS PRESENTED IN *TXO PRODUCTION CORP. V. ALLIANCE RESOURCES CORP.*, AND THE ISSUES UNDERLYING THOSE QUESTIONS, ARE NOT ANALOGOUS TO THE QUESTIONS AND ISSUES PRESENTED IN THIS CASE; THEREFORE, PETITIONERS CANNOT RELY ON *TXO PRODUCTION* IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI SUBMITTED IN THIS CASE.

Petitioners represent to this Court that their procedural due process rights have been violated in this case due to the jury's assessment of punitive damages against them. In support of this claim, Owens-Illinois, for example, boldly proclaims that:

> "This question is the same as that presented in the petition for certiorari recently granted by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S.Ct. 594 (1992). Just as in *TXO Production*, this is a case where the courts of a state have affirmed a very substantial award of punitive damages without observing the *Haslip* procedures."

Owens-Illinois' Petition for a Writ of Certiorari, page 5.

Owens-Illinois may have phrased the first question in its petition like the first question in TXO's petition (see **Appendix A**, TXO's Petition For a Writ of Certiorari, attached hereto), but the facts underlying the two cases could hardly be more dissimilar.

This case is hardly "the quintessential example of punitive damages 'run wild'", as urged by TXO in its petition (where the punitive award against TXO was 526 times the compensatory award). *See*, Appendix A at page 9a.

As admitted by Petitioners, the ratio of punitive damages to actual damages in this case is approximately 1:1. In fact, the ratio is actually a little less than 1:1, as the jury awarded punitive damages totaling $5,000,000 and compensatory damages of $5,087,000. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 666 (Tex. App.--Texarkana 1991, writ denied). None of the Petitioners have ever challenged the proportionality of punitive damages to compensatory damages in this case, nor do they now present such a complaint to this Court.

Petitioners herein repeatedly emphasize and rely on this Court's granting of the petition for writ of certiorari in *TXO Production*. However, as this Court is well aware, the questions presented in *TXO Production* are not analogous to the questions now urged by Petitioners. For the sake of clarity, these differences include the following:

a. In its petition for writ of certiorari, TXO complains of the West Virginia Supreme Court's "really mean/really stupid defendant test" that was applied to the allegedly excessive punitive damage award against TXO; TXO maintains that this test is a *newly-created standard of review* that is so vague and arbitrary that it cannot possibly pass muster under the *Haslip* safeguards that protect procedural due process rights. In stark contrast, the Texas appellate court system has *not* arbitrarily formulated any sort of new test for appellate review of the size of a punitive damage award, nor do any of the Petitioners in this case raise such a question.

b. As mentioned above, TXO (in its second question presented for review) complains of "the wide 526-to-one ratio" of punitive damages to actual damages in its case. Appendix A at page 21a. TXO emphasized that the four-to-one ratio in *Haslip* was "close to the line" of constitutional acceptability, and stressed that its factual scenario involved a business tort and was not a personal injury case. *Id*. TXO also pointed out that it had previously specifically argued "that the $10 million award violated substantive due process *because it was excessive* and disproportionate to the amount of the compensatory award." Appendix A at page 13a (emphasis added). TXO later argued its "unconstitutionally excessive" question and stated that its case "represents an extraordinary example of an overly lenient approach to excessiveness review....". Appendix A at page 25a.

However, none of the Petitioners in *this* case have ever argued on appeal that any of the punitive damage awards were "excessive" under Texas law, nor have Petitioners ever moved for or suggested a remittitur of the damages awarded by the jury in this case. Respondents emphasized these points in their brief filed with the Texarkana Court of Appeals (the intermediate Texas appellate court). *See*, **Appendix B** attached hereto, Brief of Appellees, at pages 35a, 37a. In its opinion, the Texarkana court acknowledged that the Appellants (including all Petitioners now before this Court) "have not sought a remittitur to reduce the amount of the punitive damages award." *Fibreboard Corp. v. Pool*, 813 S.W.2d at 686; *cf.*, *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151, 1153 (5th Cir. 1990) (a case in which Celotex *did* ask for a remittitur of a punitive damage award). Similarly, Respondents brought the foregoing points to the attention of the Supreme Court of Texas in response to the various applications for writ of error urged by Petitioners.

See, **Appendix C** attached hereto, Brief in Response to Applications for Writ of Error, at pages 51a-54a, 56a, 60a, 63a; *see also*, **Appendix D** attached hereto, Response to [Petitioners'] Motions for Rehearing, at page 99a. Respondents will discuss these particular points, with regard to waiver, in more detail later in this brief.

In addition, Respondents have already illustrated for the Court that the ratio of punitive damages to actual damages (proportionality) is not an issue or question in this case, as it is in *TXO Production*. Moreover, this case is a personal injury action, involving both injury and death.

c. Finally, TXO proclaimed that a "separate compelling reason" existed for this Court to review its case. Appendix A at page 14a. The third question presented by TXO was:

> "3. Whether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment."

Appendix A at page 2a (discussion and argument at pages 12a, 25a-28a).

Therefore, the reliance of Petitioners on *TXO Production* is obviously misplaced. Furthermore, the questions now presented by Petitioners in this cause have been waived, or have already been considered and denied by this Court, as the following paragraphs will illustrate. As a consequence, none of the four petitions present anything for review by this Court.

B. NONE OF THE PETITIONERS HAVE EVER

CLAIMED ON APPEAL THAT THE PUNITIVE DAMAGE AWARDS WERE EXCESSIVE IN RELATION TO THE ACTUAL DAMAGES AWARDED THE RESPONDENTS IN THIS CASE, NOR HAVE ANY OF THE PETITIONERS EVER SOUGHT A REMITTITUR OF THE PUNITIVE (OR ACTUAL) DAMAGE AWARDS; THEREFORE, PETITIONERS HAVE WAIVED ANY POTENTIAL PROCEDURAL DUE PROCESS CHALLENGE UNDER *HASLIP* AND HAVE FAILED TO INVOKE THE JURISDICTION OF THIS COURT.

Owens-Illinois complains that:

> "The trial court failed to provide Owens-Illinois with a post-trial hearing *on the excessiveness of the punitive damages award* and did not state any reasons for affirming the award."

Owens-Illinois Petition for Writ of Certiorari, page 6 (emphasis added).

However, Owens-Illinois has not shown this Court that it *asked for* any such post-trial hearing. Rule 324(b)(4) of the Texas Rules of Civil Procedure specifically requires that a point concerning "[a] complaint of inadequacy or excessiveness of the damages found by the jury *must* be included in a motion for new trial as a prerequisite to presenting such a complaint on appeal."

On November 30, 1989, Owens-Illinois did file a motion for new trial following the jury's verdict in this case; that motion, along with all of the other post-trial motions filed by Owens-Illinois and the other Petitioners, was heard by the trial court on December 27, 1989, and was overruled by the trial court on January 8, 1990. *See*, Owens-Illinois' Petition for a Writ of Certiorari, Appendix E (pages 87a-88a), and Appendix G (pages 92a-93a).

But, an examination of Owens-Illinois' motion for new trial (its Appendix E) reveals that Owens-Illinois did *not* complain about the excessiveness of any of the damage awards assessed by the jury, including punitive damages.

Owens-Illinois did urge a *substantive* due process complaint ("repeated imposition of punitive damages against Owens-Illinois for substantially the same conduct") in its motion for new trial, but did not complain that the punitive damage award against it was excessive--Owens-Illinois did aver that its alleged substantive due process complaints violated the excessive fines clause of the Texas Constitution, but that is not the equivalent of a complaint of excessive damages. *See eg.*, *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1029 (5th Cir. 1990), _____ U.S. _____, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991).

Conversely, *Haslip* involved due process challenges to a judgment awarding punitive damages following a complaint that the award was excessive--as Respondents emphasized in their brief filed with the Supreme Court of Texas. *See* Appendix C at page 51a-52a; *see also*, *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1044 (1991).

None of the Petitioners have ever complained on appeal that the punitive damage awards in this case were excessive, nor did they request a remittitur of any of the punitive damage awards. Therefore, Petitioners have failed to properly preserve their *Haslip* procedural due process complaints for review by this Court.

Further evidence of waiver is shown by the Petitioners' failure to request additional instructions to guide the jury. *See eg.*, *McCleary v. Armstrong World Industries, Inc.*, 913 F.2d 257, 260 (5th Cir. 1990). All of the Petitioners complain generally of the alleged lack of constraint on the discretion of Texas juries, yet none of them are able to show this Court that they requested any additional constraints on the jury in *this* case. For example, Celotex argues (generally) that:

"Juries are given no guidance in their award,

> are not instructed of prior punishment for identical conduct, and the resulting verdict is arbitrary and capricious."

The Celotex Corporation's Petition for a Writ of Certiorari, Appendix F at page 83a.

Yet, Celotex does not show this Court how, when and where it *asked for* such an instruction to be given to this jury.

C. ALTERNATIVELY, THE RECORD IN THIS CASE CLEARLY SHOWS THAT PETITIONERS WERE AFFORDED ALL OF THE *HASLIP* PROCEDURAL DUE PROCESS SAFEGUARDS UNDER TEXAS LAW.

The procedural due process arguments made by Petitioners challenging the adequacy of Texas law under *Haslip* have already been considered and denied by this Court.

For the sake of brevity, Respondents refer the Court to Appendix C attached hereto, pages 60a-62a, which clearly outlines how the Texas common-law method of assessing punitive damages has already been reviewed by the Fifth Circuit and this Court in the context of a procedural due process challenge under *Haslip*, and how the Texas procedures have been pronounced constitutionally sound. Most recently, the Fifth Circuit has stated:

> "We conclude that Texas procedures for assessing and reviewing punitive damage awards *satisfy the requirements of due process*.
>
> ....
>
> "We get no indication from *Haslip* that the Court will scrutinize each state's procedure with Alabama as the precise model. The Court laid down the general requirements: limits on jury discretion and adequacy of post-trial review. *Texas meets those requirements*."

Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1097, 1099 (5th Cir. 1991), *cert. denied*, ______ U.S. ______, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992) (emphasis added); *see also*, *Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992).

The Texas district court properly followed established Texas procedure in this case. *Cf.*, *Brown v. Petrolite Corp.*, 965 F.2d at 49. On appeal, the Texarkana Court of Appeals examined the trial court's verbal instructions and the written charge given to the jury in this case and concluded that "the punitive damage award was based on an objective criterion, and thus, the [procedural] due process provision of the fourteenth amendment was not violated." *Fibreboard v. Pool*, 813 S.W.2d at 686; *see also*, Appendix B at pages 40a-43a. As in *Haslip* and *Glasscock*, the district court in the case at hand "imposed limitations on the exercise of the jury's discretion to award punitive damages." *See*, *Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1097-98.

Furthermore, the intermediate Texas appellate court was required to--and did--examine the reasonableness of the punitive damage awards in conformity with the factors set forth in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). *See*, *Fibreboard v. Pool*, 813 S.W.2d at 686-87; *see also*, *Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992); Appendix C at pages 61a-62a. The Texarkana court concluded:

> "The present case focuses on a lack of adequate warnings. *The exemplary damages awarded in this case were* not based upon the companies' conduct in manufacturing and distributing asbestos, but, according to the wording of the jury questions, was *based upon the failure to warn those handling the product of its potential dangers*."

Fibreboard v. Pool, 813 S.W.2d at 678 (emphasis added).

Significantly, the Texarkana Court of Appeals later emphasized that:

> "The wrongful conduct was a failure to warn about the use of a product which could result in serious illness and death by suffocation....".

Id. at 687.

After examining all of the evidence in the record on appeal, the appellate court concluded:

> "In relationship to the actual damages and the nature of the wrong, as well as the other factors, the record supports the award of punitive damages."

Id.

Under the circumstances of *this* case, the Texas procedures for assessing and reviewing the punitive damage awards satisfied procedural due process. *Cf.*, *Glasscock v. Armstrong Cork. Co.*, 946 F.2d at 1099. And, as recognized by the Fifth Circuit,

> "...the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas systems from the simplistic 'passion and prejudice' analysis referred to in *Haslip*."

Id. at 1098-99.

Furthermore, Respondents take exception to Fibreboard's misleading proclamation that "Texas appellate courts do not review the whole record." Fibreboard Corporation's Petition for a Writ of Certiorari, page 14. This broad, generalized comment is not an accurate statement of Texas law. Petitioners fail to mention that they asserted a myriad assortment of "no evidence" points of error *and* "insufficient evidence" points of error on appeal. After initially submitting over 100 collective points of error, Petitioners were requested to consolidate these points, and eventually filed separate briefs setting out 38 different points of error. *Fibreboard Corp. v. Pool*, 813 S.W.2d at 666. Many of these points of error were insufficient evidence points of error. In considering an insufficient evidence point of error, intermediate appellate courts in Texas are required to consider and weigh *all* of the evidence in order to determine if a jury's finding is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988); *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986); *Dyson v. Olin Corp.*, 692 S.W.2d 456 (Tex. 1985); *In re King's Estate*, 150 Tex. 662, 664-65, 244 S.W.2d 660, 661 (1951). Accordingly, the Texarkana court properly considered and weighed all of the evidence in this case many times over, and specifically reviewed all of the evidence in affirming the punitive damage award against Fibreboard.

Respondents emphasize that Texas appellate evidentiary review of punitive damages has been closely reviewed and has never been found to be unconstitutional in any manner, shape or form.

II. MULTIPLE PUNITIVE DAMAGE AWARDS DO NOT OFFEND THE CONCEPT OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT; IN THIS CASE, THE ASSESSMENT OF PUNITIVE DAMAGES IS RELATED TO SPECIFIC INDIVIDUAL HARM AND IS NOT VIOLATIVE OF SUBSTANTIVE DUE PROCESS.

A. PETITIONERS DO NOT PRESENT THIS COURT WITH AN ADEQUATE RECORD IN SUPPORT OF THEIR SUBSTANTIVE DUE PROCESS COMPLAINTS.

Petitioners' general assertions that multiple punitive damage awards violate substantive due process present nothing new for review by this Court. The Fifth Circuit has addressed, and rejected, this particular claim many times. *See*, *Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1096-97, *cert. denied*, _____ U.S. _____, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992); *King v. Armstrong World Industries*, *Inc.*, 906 F.2d at 1029-30, *cert. denied*, _____ U.S. _____, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991); *see also*, *McCleary v. Armstrong World Industries*, 913 F.2d 257, 260-61 (5th Cir. 1990); *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151, 1154-55 (5th Cir. 1990). As reflected in the foregoing citations, this Court denied the petitions for writ of certiorari that urged this specific constitutional argument, and foreclosed this complaint, in *Glasscock* and *King*. Respondents' summary of the foregoing case law and their arguments presented to the Supreme Court of Texas concerning this constitutional issue is found in Appendix C attached hereto, at pages 54a-60a. *See also*, *Fibreboard v. Pool*, 813 S.W.2d at 687. Close scrutiny of the various petitions presented to this Court reveals only general comments and general arguments concerning matters already denied review.

Respondents are, however, compelled to once again emphasize that each of them has their own cause of action against the Petitioners--a cause of action *unique* to each individual Plaintiff/Respondent. Each was also possessed of a right to seek, and justify in the record, punitive damages for every Petitioners' willful and intentional failure to warn about the dangers of asbestos. *See*, *Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1096. Every Respondent in this case assumed these burdens of proof at trial, and proved the same to a jury of their peers. Moreover, the appellate courts of Texas have addressed all of the complaints of Petitioners in this vein, and have found them lacking. Petitioners' "single course of conduct" argument is perhaps best answered by the Fifth Circuit's straightforward reply to this complaint:

> "There is no principle in law limiting recovery
> of punitive damages to the first claimant."

Id. at 1096-97.

These punitive damage awards, and every punitive damage award involving asbestos injury, have been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed, nor could such an award be assessed. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual, from minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded.

The reasoning of Owens-Illinois seems particularly flawed in that it ignores the definition of "exemplary damages" provided to the jury in *this* case. Each of the jury questions, concerning each individual Petitioner, contained the following definition:

> "'EXEMPLARY DAMAGES' means an amount that you may in your discretion award *as an example to others* and *as a penalty or by way of punishment*, in addition to any amount you may have found as actual damages."

Fibreboard v. Pool, 813 S.W.2d at 693, n.9 (emphasis added); *see also*, Appendix B at page 42a.

As the Texarkana Court of Appeals so succinctly stated:

> "Under the terms of this definition, it is difficult to believe that the jury could base its findings on anything *other than the conduct which caused the injuries*."

Fibreboard v. Pool, 813 S.W.2d at 693 (emphasis added).

Some of the Petitioners discuss the existence of other alleged civil awards against them and urge this point in support of their substantive due process complaints. *Cf.*, *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. at 1045. Incredibly, the Fibreboard Corporation argues this point in support of its petition, but has never presented evidence of any other punitive damage awards at any stage of this litigation. *See*, Fibreboard Corporation's Petition for a Writ of Certiorari, pages 16-17; *see also*, Appendix C at page

58a. Fibreboard's unsupported argument is yet another example of the glaring failure of all Petitioners to present this Court with an adequate record to support their contentions.

Notwithstanding the insufficient record to support their argument, Petitioners urge that it is the combination of past awards and the potential of future awards that violates due process. Interestingly, in the twenty years of litigation following *Borel v. Fibreboard Products Corp.*, 493 F.2d 1076 (5th cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 2107 (1974), Owens-Illinois claims the existence of over 70,000 lawsuits, but by affidavit can only demonstrate seven cases where punitive damages have been awarded.

Nevertheless, the Petitioners argue that all future plaintiffs' rights should be foreclosed because of a previous punitive damage award relating to a different specific individual with different injuries. Such a holding by this Court would result in the overturning of a jury verdict that is admitted to be based on sufficient evidence and not excessive, because of a single post-trial affidavit that is not verified by any independent party. Furthermore, such a holding by this Court would arbitrarily discriminate between injured men and women and force a race to the courthouse to secure the initial and only award.

Absent a relationship, as exists under Texas law, between individual harm and the punitive award, how is this Court or any court to determine the number or amount of awards to be allowed before foreclosing future injured people? Is one award enough or ten too many, when over 70,000 have been injured? Are we to fashion public policy to reflect that if one person is injured or killed, punitive damages may be recovered, but not if 70,000 are injured or killed? A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of harm or the *potential* of future awards, completely destroys the policies of fairness, justice and deterrence.

Likewise, Owens-Illinois' Appendices E and F (pages 87a-91a) vaguely aver that Owens-Illinois "has been subjected to punitive damage verdicts" that total more than four million dollars. What does this mean? This post-trial "evidence" certainly does not establish actual *payment* of any such awards, nor does it conclusively reflect entry of judgment, the signing of any judgment, settlement, etc. Moreover, this alleged proof was never presented to the *jury* for consideration. *Cf.*, *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2nd Cir. 1990), *cert. dism'd*, 497 U.S. 1057, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990).

Similarly, Celotex's Appendix F (pages 82a-95a) reflects payment of only two punitive damage awards, totaling $175,000. *See also*, Appendix C attached hereto, at page 24. And, once again, these payments were not disclosed to the jury in this case. Fibreboard's petition and appendices contain no reference at all to other punitive damage awards.

It is clear that the "record" relied upon by Petitioners is simply insufficient to permit an examination of their claims that there are multiple awards of punitive damages offensive to the fundamental fairness principles embodied in substantive due process. This Court should deny any review of this issue, for the same reason the Second Circuit declined to set aside a punitive damage award:

> "...there has been insufficient proof to demonstrate an unjust result of multiple imposition of punitive damages for the same course of conduct."

Johnson v. Celotex Corp., 899 F.2d 1281, 1287 (2nd Cir. 1990), *cert. denied*, ______ U.S. ______, 111 S.Ct. 297, 112 L.Ed.2d 250 (1990); *see also*, *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2nd Cir. 1989).

Finally, aside from actual payment of any other punitive damage awards, Petitioners present little--if any--

proof that the grievous misconduct in this case is the same misconduct that occurred in any other case. Their appellate record in this regard is entirely insufficient and does not begin to justify review. *See*, *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d at 281.

The Petitioners were afforded the full protection of due process, received a fair trial and complete appellate review. Consequently, the petitions should be denied.

III. THE TEXAS SUPREME COURT AND THE COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, PROPERLY AFFIRMED THE TRIAL COURT JUDGMENT AGAINST GARLOCK UNDER STRICT LIABILITY FOR ACTUAL DAMAGES BECAUSE THE EVIDENCE ESTABLISHED THAT GARLOCK KNEW OR SHOULD HAVE KNOWN OF THE DANGERS OF ITS PRODUCTS, THAT THE PRODUCTS WERE DEFECTIVE FOR FAILURE TO WARN AND THAT GARLOCK CONTRIBUTED TO CAUSE THE PLAINTIFFS' INJURIES.

Petitioner Garlock improperly asks this Court to reconsider and weigh evidentiary matters that are wholly within the province of the Texas courts. Garlock has previously urged only "no evidence" and "insufficient evidence" points of error on appeal, and the Texas courts after reviewing all of the evidence have held that "there was sufficient evidence to support the findings against Garlock. These (Garlock's) points of error are overruled." *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687-688 (Tex. App.--Texarkana 1991, writ denied).

Garlock admits that it "did not specifically frame its no evidence challenge in the state courts in terms of the denial of due process under the Fourteenth Amendment." Garlock's Petition for Writ of Certiorari, pages 3-4. In fact, Garlock never mentioned due process or the Fourteenth Amendment before the Texas court. Incredibly, Garlock now fabricates a "presumption of liability," distorts the opinion of the Texas Court of Appeals, and completely ignores the direct evidence on each element of the plaintiff's cause of action contained in the record, in a thinly veiled attempt to invoke the jurisdiction of this Court.

Contrary to the assertions of Garlock, the Texas Court of Appeals, Sixth District, specifically addresses Garlock's products and the appropriate authorities at *Pool*, 813 S.W.2d at 687-688. The Court of Appeals correctly cites case authority and the application of the record to that authority and unequivocally finds sufficient evidence to support the jury's findings. The Court does not rely on a "presumption of liability," but rather quotes the direct evidence applicable to Garlock's products and the causation of the injuries to the plaintiffs.

Under Texas law, a manufacturer of a defective product may be liable under the theory of strict liability in tort as expressed in RESTATEMENT (SECOND) OF TORTS § 402A (1964). *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1964).

The bedrock authority in an asbestos case is the Texas diversity opinion of *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 2107 (1974). In discussing the failure to warn cause of action, the Fifth Circuit quoted comment (j) to section 402A, for the underlying principle that a seller has a responsibility to inform users and consumers of dangers which the seller either knows or should know at the time the product is sold. *Id.* at 1088.

A. *Garlock's Products are Defective.*

Garlock's products were properly proven defective by expert testimony of Dr. Joseph Wagoner, Dr. Jeff Britton, and through cross-examination of Garlock's expert witness, Dr. Clark Cooper. Respondents demonstrated, through numerous medical and scientific articles beginning in 1898 and expert testimony, the dangers of asbestos exposure and that there was *no safe level* of exposure to asbestos. *See*, *Fibreboard Corp. v. Pool*, 813 S.W.2d at 687-88.

Concerning Garlock's reliance on Threshold Limit Values (TLV's) Dr. Waggoner testified that, in the New York Academy of Sciences, it was reported by a member of industry:

> "The TLV's are industry's values, but industry generally does not develop anywhere near enough kinds and amounts of data that can be used to establish a TLV of a new substance, but industry has the sole responsibility to develop data on its own products. Government is not in a position to develop enough facilities to handle the problem in total, nor should it when reliable toxicological consultants are now available."

Appendix C at page 90a.

Dr. Wagoner also testified, as a member of the committee that adopted the industry TLV's, that the standard was lowered. More importantly, he repeatedly emphasized that the government recommendation included not only suppression of dust below the TLV, but also, *that the TLV be coupled with worker education*, a *respirator program*, and *warning labels*. Garlock continually asserts only part of the recommendation. The rest of the recommendation clearly requires *warning the consumer which is the basis of this lawsuit*. Appendix C at page 90a.

B. *Garlock Products were Used by the Plaintiffs and Contained Asbestos.*

Mr. Charles Strong testified that Garlock made three or four types of asbestos packing and gasket material that these men worked with at Texas Eastman. Mr. Strong positively identified from a Garlock product book, Garlock 257, Garlock 252, Garlock asbestos yarn and Garlock sheet gasket material. Appendix C at page 92a. Mr. Strong also described the products and how he and the other plaintiffs used the material. He stated that these products were used at Texas Eastman in the '50's, '60's and '70's. He testified that these products manufactured by Garlock contained asbestos. Appendix C at page 92a.

Mr. Charles Kimball Flint, the purchasing agent for Texas Eastman, also testified concerning Garlock products. Appendix C at page 92a. Mr. Flint testified that he had purchased products from Garlock that contained asbestos. Appendix C at page 92a. He testified that he remembered purchasing *compressed asbestos sheet packing* and *square braided asbestos packing* that would be used for *sealing joints* and *for packing pumps or packing valves*. Appendix C at page 92a. He also testified that the asbestos sheet packing was a gasket material that had to be cut to be used and was used in all the buildings in Texas Eastman, "plant-wide." Appendix C at page 92a.

Obviously, completely contrary to Garlock's assertions, these men testified to use of specific Garlock products that contained asbestos in the 1950's, 1960's and 1970's. Plaintiffs, Freeman, Strong, Sledge and Pool worked together at Texas Eastman, and used the same products in the same manner. Appendix C at page 92a.

C. *Garlock Products Released Asbestos Fiber when Used in a Foreseeable Manner.*

Mr. Charles Strong specifically testified that Garlock products had to be replaced and when being replaced, were dusty. Appendix C at page 92a. In the process of removing the old worn out packing material, it was necessary to scrape it, beat it, and pull on it. Appendix C at page 93a. He further testified that this work was performed throughout the years he worked at Texas Eastman. Appendix C at page 93a. He also described cutting the gasket material many times with pocket knives and machines and every time it was cut, asbestos dust and fibers were released. Appendix C at page 93a.

Clearly, it is foreseeable by the manufacturer of packing and gasket material that gasket material will become dry, worn out and have to be replaced. Garlock knew its products were used in refineries and large plants and is charged with knowing the foreseeable use, application and removal of its products. *Borel v. Fibreboard Paper Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 2107 (1974). Garlock has never asserted that these men were not using their products in a foreseeable manner.

Garlock *incorrectly states that Dr. Wagoner did not testify concerning the dangers of asbestos in this type of product or used in this manner*. Dr. Wagoner, referring to articles published in *1932* and *1935* discussing conditions under which *asbestosis* was known to occur, found that the people were working with "*packing and joining*." Appendix C at page 93a. He continued citing publications in 1960 where the diseases asbestosis and associated cancers were found in people working as "*asbestos packer*" and "*unpacker*."

Clearly, sufficient evidence was presented concerning the release of asbestos fibers from Garlock products when used in a foreseeable manner and the association of asbestos-related disease with the use of this type material.

D. *Garlock Failed to Warn.*

Mr. Strong and all the plaintiffs testified that there was not a warning on any box of insulation used in Texas Eastman. Appendix C at page 94a. He further testified that no one from Garlock ever gave him any kind of a warning concerning the dangers of asbestos. Appendix C at page 94a.

Finally, Mr. Flint, the purchasing agent for Texas Eastman, testified that he had never received any type of warning or instructions concerning products containing asbestos. Appendix C at page 94a.

E. *Sufficient Evidence Exists in the Record that Exposure*

to Garlock Products is a Producing Cause of Plaintiffs Injuries

Through the testimony of Dr. Wagoner and Dr. Britton, sufficient evidence exists to support the jury finding that exposure to Garlock's products was a producing cause of the Plaintiffs' injuries. Dr. Wagoner described the dose-response nature of asbestos-related disease. Appendix C at page 94a. Dr. Britton testified that a small amount of exposure, even for a single day, can stimulate some degree of the disease process. Appendix C at page 91a. All doctors agreed that it is the cumulative exposure over many years that causes the asbestos-related diseases.

Finally, Garlock quotes and relies on *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985). In *Gideon*, there was no evidence that Gideon's inhalation of a relatively small amount of asbestos fibers was a substantial factor in causing his condition. *Id*. at 1145. Respondents in this case provided testimony of Dr. Britton concerning the effect of inhalation of asbestos, even in small amounts. Respondents also established substantial exposure to asbestos fibers from Garlock products used throughout the plant over a 30-year period.

Garlock quotes *Gideon* for the statement that "[c]ompliance with such governmental safety standards constitutes strong and substantial evidence that a product is not defective." *Id*. at 1144. This quote is made by the court pursuant to a *factual* sufficiency argument. Respondents don't suggest that compliance is not some evidence of no defect, but it does not *conclusively establish* the fact. The Fifth Circuit specifically said:

> "We reach this conclusion only on the record before us and do not hold that such proof might not be possible in another case."

Id. at 1145.

In contrast to *Gideon*, the evidence demonstrated that the exposure and causation in this case was substantial and extends over several decades. Respondents elicited specific testimony on each of the missing facts of *Gideon*. Clearly, Garlock's petition should be denied.

CONCLUSION

The Texas common law system of review of a punitive damage award clearly satisfies the requirements of *Haslip* and due process. Furthermore, these Petitioners did not avail themselves of the protections of that system nor did they preserve an adequate record to substantiate their contentions.

Specific and substantial evidence was presented concerning Garlock's products and the causation of the injuries to the Respondents. Therefore, Respondents respectfully request that these petitions for writ of certiorari be denied.

Respectfully submitted,

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LIST OF APPENDICES

APPENDIX A --	TXO's Petition For a Writ of Certiorari, in *TXO Production Corp v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *cert. granted*, 113 S.Ct. 594 (1992).
APPENDIX B --	Brief of Appellees (this appendix contains selected excerpts from the appellate brief filed by Plaintiffs/Appellees, the Respondents now before this Court, with the Texarkana Court of Appeals).
APPENDIX C --	Brief in Response to Applications for Writ of Error (this appendix contains selected excerpts from the appellate brief filed by Plaintiffs/Respondents with the Supreme Court of Texas).
APPENDIX D --	Response to Motions for Rehearing (filed by Plaintiffs/Respondents with the Supreme Court of Texas).

APPENDIX A

No. 92-479 FILED SEPT. 17,1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

TXO PRODUCTIONS CORP.,
Petitioner,
v.
ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Appeals
of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 1043 (1991), violated TXO's procedural due process rights.

2. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

3. Whether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner TXO Production Corp. has been merged into Marathon Oil Company.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that its parent company is USX Corp.

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CONSTITUTIONAL PROVISION

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In The
Supreme Court of the United States
October Term, 1992

No.

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

TXO Production Corp. petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App., *infra*, 1a-52a) is not reported. The separately filed concurrence of McHugh, C.J., of the Supreme Court of Appeals of West Virginia (App., *infra*, 53a-54a), is not reported. The ruling of the Circuit Court of McDowell County, West Virginia, on petitioner's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, or, in the alternative, for remittitur, is not reported. The transcript of the proceeding on that motion is included in the Appendix (App., *infra*, 55a-74a) as is the court's written order. (App., *infra*, 75a-76a). The ruling of the Supreme Court of Appeals of West Virginia on the petition for rehearing (App., *infra*, 77a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on May 14, 1992. A petition for rehearing was denied on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

This case presents the quintessential example of punitive damages "run wild." *Pacific Mut. Life Ins. Co. V. Haslip*, 111 S.Ct. 1032, 1043 (1991). The dispute began as a declaratory judgment action brought by petitioner TXO Production Corp. ("TXO") to interpret a mineral severance deed. It resulted ultimately in a jury award against TXO of $19,000 in compensatory damages and $10 million in punitive damages on defendants' counter-claim for slander of title. Although the punitive award was 526 times the compensatory award, and was rendered without the procedural safeguards that this Court found to be crucial in *Haslip*, and that the Supreme Court of Appeals of West Virginia itself had held to be mandated under *Haslip*, the judgment was affirmed on appeal.

1. In the summer of 1984, TXO became interested in leasing a tract of land in McDowell County, West Virginia, known as the "Blevins tract," for purposes of oil and gas exploration and production. App., *infra*, 7a-8a. The title holder, Tug Fork Land Company ("Tug Fork"), had leased the oil and gas development rights. The lease had been assigned to Alliance Resources Corporation ("Alliance"). App., *infra*, 7a. In 1985, TXO and Alliance signed an agreement under which TXO would pay Alliance $20 per acre for its interest in the Blevins tract; Alliance would assign to TXO its full title and interest in the lease, reserving an overriding royalty interest; and Alliance would reimburse TXO the consideration paid for the lease if TXO determined through title examination that title had failed as to all or any part of the leased premises. App., *infra*, 8a-9a & n.1.

TXO thereafter retained a West Virginia law firm to perform a title examination prior to drilling a well. App., *infra*, 9a. TXO's attorneys found a problem with the title, opining that in a 1958 deed, Tug Fork had conveyed to one Leo J. Signaigo, Jr., the oil and gas rights to the Blevins tract, and that those rights were now held by Signaigo's successor in interest, Virginia Crews Coal Company ("Virginia Crews").[1] App., *infra*, 9a; Tr. 388-90; 409-12[2]

TXO was unwilling to invest over $200,000 in drilling an oil and gas well on the property until it had cleared any potential cloud on the title. See App.,*infra*, 12a. Accordingly, TXO obtained and recorded a quitclaim deed in which TXO was granted any rights that Virginia Crews might have to the property. App., *infra*, 11a.

Thereafter, TXO called a meeting with Alliance. The West Virginia Supreme Court characterized TXO's actions at that meeting, taken together with TXO's failure to discuss the title problem with respondents prior to having recorded the quitclaim deed, as a bad-faith attempt "to use the purported cloud as leverage for increasing its interest in the oil and gas rights." App., *infra*, 11a-12a.

2. Shortly after that meeting, on August 23, 1985, TXO filed its complaint in the Circuit Court of McDowell County, West Virginia, for declaratory judgment to quiet title. App., *infra*, 12a. Respondents counter-claimed,

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[1] In reaching this conclusion, counsel relied upon the language in the 1958 deed to Signaigo, the non-assessment of any taxes on the mineral estate to Tug Fork and its successors, and importantly, the assessment and payment of taxes on the mineral estate by Virginia Crews and its predecessors in interest. *See* Rec. 1591, 1605, 1611-12 (Pl. Ex.3).

[2] The record in the Supreme Court of Appeals of West Virginia is cited herein as "Rec" The trial transcript begins at page 2177 of that record. The page numbers of the trial transcript are referenced as "Tr. _____"; they are not otherwise paginated in the record.

alleging the 1958 deed was unambiguous in reserving the entire oil and gas estate to Tug Fork and its assignees, and that the recording of the quitclaim deed on July 11, 1985, constituted a slander of their title to the Blevins tract.

The question whether there was in fact a defect in the chain of title was tried to the court in a bifurcated action. On December 17, 1987, without taking any evidence, the court ruled that title was vested in Tug Fork. App., *infra*,12a; Rec. 691-722.

In June of 1990, the case on the counterclaim for slander of title went to trial before a jury. The jury found for respondents, and awarded $19,000 to compensate respondents for their attorney's fees incurred in defending the declaratory judgment action brought by TXO. App., *infra*, 12a, 20a. No award was made for any actual damage to respondents' property rights or to their ability to sell or lease the property. See App., *infra*, 20a. Although it found no actual property damage, the jury awarded $10 million in punitive damages against TXO, an amount approximately 526 times the compensatory award.[3]

TXO moved for judgment notwithstanding the verdict or, in the alternative, for remittitur, based, *inter alia*, upon the excessiveness and disproportionality of the punitive award given the lack of harm to respondents, and the absence of meaningful standards for the jury and the trial court in determining the severity of the award. App., *infra*, 55a-69a. The court, without explanation, denied the post-trial motions from the bench. App., *infra*, 72a.

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[3] Over TXO's objections, respondents presented hearsay testimony of unrelated "other acts" of TXO. App., *infra*, 21a-24a. Four attorneys from Louisiana, Oklahoma, and Texas were permitted to give their opinions concerning TXO's conduct in cases filed in those states, wholly unrelated to the parties, facts, or underlying cause of action in the case at bar. App., *infra*, 21a-24a. The West Virginia Supreme Court approved the admission of this testimony under West Virginia's "catch-all" exception to the hearsay rule. App., *infra*, 30a-32a.

3. The West Virginia Supreme Court affirmed. First, it rejected TXO's argument that TXO had been denied due process because it was not afforded the procedural safeguards approved in this Court's decision in *Pacific Mutual Life Insurance Co. V. Haslip, supra*, 111 S.Ct. 1032, and applied by West Virginia Supreme Court in *Garnes V. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) (on remand from the United States Supreme Court, 111 S.Ct. 2882 (1991).[4] App., *infra*, 7a, 32a.

In *Garnes*, the West Virginia Supreme Court, "following the dictates of *Haslip*," set out a detailed procedure for awarding punitive damages in compliance with the requirements of due process. *Garnes*, 413 S.E.2d at 908. This procedure was designed to provide "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review." 413 S.E.2d at 908. Under this new system, the trial court is required, at a minimum, to explain five specific criteria to the jury for use in determining the appropriateness and size of the punitive award. App., *infra*, 33a-34a (citing *Garnes*, 413 S.E.2d at 908-09). These same factors, plus four others, are to taken into consideration by the trial court upon its review of the award. App., *infra*, 34a (citing *id.* at 909). Finally, the West Virginia Supreme Court's review of a punitive damages award must be based upon the same factors. *Garnes*, 413 S.E.2d at 910. In *Garnes*, the West Virginia Supreme Court reversed the judgment, and remanded the case for a new trial to be conducted under the requirements the court had articulated. *Id.* at 910-11.

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[4] Both *Haslip* and *Garnes* were decided after TXO's motion for judgment *n.o.v.* had been ruled upon.

The West Virginia Supreme Court, however, took a different course with respect to TXO. Although the court recognized that it had "set out [the *Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*," App., *infra*, 35a, it decided not to apply these guidelines retroactively to cases tried before the *Garnes* decision, thereby denying TXO these due process protections. App., *infra*, 32a.

Additional, the court rejected TXO's claim that the $10 million award violated substantive due process because it was excessive and disporportionate to the amount of the compensatory award. See App., *infra*, 40a. Purporting to set out "broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages," App., *infra*, 35a, the court concluded:

> Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.

App., *infra*, 36a, 51a-52a. The court then explained that "[i]n cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the outer limit of punitive damages is *roughly* five to one." App., *infra*, 38a (emphasis in original). By contrast, according to the court, "[w]hen the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant . . . . [In such cases]. . . even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*." App., *infra*, 39a. Based upon the "really mean"/"really stupid" test, the court concluded that the $10 million award against TXO was acceptable. App., *infra*, 40a[5]

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Appeals of West Virginia in this case denied petitioner TXO the procedures approved by this Court in *Pacific Mutual Life Insurance Co. V. Haslip*, 111 S.Ct. 1032 (1991), as satisfying the Fourteenth Amendment; it established a new test for appellate review of the size of a punitive award that is inherently arbitrary and thus itself violates due process; and it approved an award so grossly excessive and disproportionate to actual injury that it constitutes a denial of due process. The West Virginia Supreme Court's decision is in conflict with other state-and federal-court decisions rendered post-*Haslip*. This Court's review is therefore necessary to resolve those conflicts and to ensure that defendants in cases involving punitive damages are afforded the protections due under *Haslip*.

A separate compelling reason exists for the Court to review this case. The West Virginia Supreme Court declined to afford TXO the process that, in *Garnes V. Fleming Landfill, Inc.*, 413 S.E.2d 897, it had earlier held are mandated under *Haslip*, and that it had applied to the parties in that case. By refusing to apply its *Garnes* due process standards to this case, the West Virginia Supreme Court acted in a manner contrary to the principles of retroactivity law animating this Court's decision in *James B. Beam Distilling Co. V. Georgia*, 111 S.Ct. 2439 (1991). This Court should grant review to decide whether, under *James Beam*, state courts must retroactively apply decisions interpreting federal law.

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[5] Chief Justice McHugh, joined by Justice Miller, wrote separately, criticizing the "ridiculous categorization" adopted by the majority to determine what level of punitive damages is permissible. Specifically, the Chief Justice denounced the majority's "use of such subjective and nontechnical terms as 'really mean' and 'really stupid'" as a "cavalier attempt to be clever and amusing." App., *infra*, 53a-54a.

1. In *Haslip*, this Court emphasized that the *three layers* of safeguards provided by Alabama's scheme for imposing punitive damages were vital to its decision upholding the award of punitive damages in that case. 111 S. Ct. at 1046. Under Alabama's system, these safeguards were provided through the jury instructions, post-trial review conducted by the trial court on the record, applying specific criteria, and appellate review, also applying specific criteria. *Id.* at 1044-46. By contrast, TXO was denied "the full panoply of [such] procedural protections." *Id.* at 1046. The $10 million award was subjected to no "meaningful and adequate review by the trial court." *Id.* at 1044. Nor was TXO afforded the sort of appellate review this Court found essential to provide a "definite and meaningful constraint on the discretion of [the] fact finders." *Id.* at 1045. The West Virginia Supreme Court approved a $10 million award made without the procedural protections that are constitutionally required. It is unsurprising that this approval is in conflict with other courts' views of what due process requires under *Haslip*.[6]

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[6] What makes the holding particularly worthy of review by this Court is that the West Virginia Supreme Court is not the only court that has adopted a cavalier approach to *Haslip*. *See, infra*, notes 10 and 11.

a. Under the Alabama procedure approved in *Haslip*, "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so. . . . Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging other from similar conduct,'. . . . and 'other factors, such as the impact on innocent third parties.'" 111 S. Ct. at 1044 (citations omitted) (quoting *Hammond V. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)).

Here, in stark contrast to the approved approach, the trial court summarily denied TXO's post-trial motions from the bench. App., *infra*, 74a. The absence of any post-verdict review on the record deprived TXO of its full due process rights. Yet, the West Virginia Supreme Court found no constitutional infirmity. App., *infra*, 7a.

In several recent cases, other trial courts' summary approvals of punitive damages awarded by juries have been held to violate due process under *Haslip*. In *American Employers Insurance Co. V. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), for example, the jury had awarded $400,000 in compensatory damages and $750,000 in punitive damages against an insurance company on a bad-faith claim. The jury instruction was "substantially similar to the one in *Haslip*," 931 F.2d at 1464, but the trial court denied defendant's motions for judgment *n.o.v.* or, in the alternative, for a new trial and remittitur "without comment," *id.*, as the trial court did here. The Eleventh Circuit found that this summary denial did not meet the *Haslip* standards for post-trial review, and remanded for the trial court to set forth in the record its review of the factors approved in *Haslip*. *Id.*

Likewise, the Eighth Circuit has on two occasions expressed concern over the record's lack of a "meaningful and adequate review by the trial court" of punitive damages awards, *Haslip*, 111 S. Ct. at 1044, and has remanded those cases for such a review to be placed on the record. Thus, in *Cole V. Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991), the jury awarded $2 million in punitive damages, 13 1/3 times more than the compensatory award of $150,000. In reviewing the defendant's due process challenge to the punitive award, the court's concern over "whether the district court . . . appropriately reviewed the punitive damage award" caused it to remand the case "so that the district court [might] conduct this review under the standards articulated in *Haslip*." 947 F.2d at 320.

And in *Robertson Oil Co. V. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), the plaintiff was awarded $750,000 in compensatory damages and $8 million in punitive damages. The court first found that the jury instructions were adequate under *Haslip*. *Id.* at 1347. Then the court observed the "*Haslip* also stresses the importance of the trial and appellate courts' roles in scrutinizing punitive damages awards." *Id.* The court concluded that the punitive award had to be vacated because the district court, like the trial court here, had "denied summarily" the defense motion for remittitur. Accordingly, the court of appeals "remand[ed] for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip*." *Id.* See also *Medical Mut. Liab. Ins. Soc. V. B. Dixon Evander & Assocs.*, No. 1752, 1992 Md. App. LEXIS 144 (Md.Ct. Spec. App. July 13, 1992) (vacating punitive damages and remanding based in part on lower court's failure to record its findings as to the propriety of the award).

In each of these cases, the appellate court overturned an award of punitive damages and remanded for the trial court to provide defendants with the procedural protections mandated by the Due Process Clause, protections that had been eviscerated by the trial courts' summary consideration and rejection of the defendants' claims. In this case, by contrast, the West Virginia Supreme Court affirmed the judgment and award of punitive damages even though the trial court had summarily rejected TXO's challenge to the punitive damages award without, conducting any sort of analysis. The West Virginia trial court's summary approval of the $10 million punitive award is indistinguishable from the decisions of the other trial courts found inadequate by the Eleventh and Eighth Circuits. Review by this Court is clearly warranted to resolve the existing conflict among the lower courts concerning precisely what is required by *Haslip*.

b. Additionally, TXO was deprived of due process at the appellate level. The West Virginia Supreme Court addressed neither the jury instructions nor the nonexistent review by the trial court. Instead, turning its back on the appellate standards articulated in its *Garnes* decision, the West Virginia court formulated and applied a "really mean"/"really stupid" defendant test in lieu of the type of "detailed substantive standards" approved in *Haslip*.[7] 111 S.Ct. at 1045. Setting forth "broad, general guidelines" for future application, App., *infra*, 35a, the court held that the outer limit for punitive damages imposed on "really stupid" defendants is roughly set by a five-to-one ratio, whereas punitive damages imposed on "really mean" defendants are constitutional no matter what their relationship to the plaintiffs' actual injury. App., *infra*, 38a-39a.

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[7] Also representative of the cursory "review" performed by the West Virginia Supreme Court is the court's statement that "because [TXO] and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur." App., *infra*, 7a.

This wholly arbitrary "test" [8] does not comport with due process. Rather, it invites trial and appellate courts to evaluate subjectively a defendant's acts as either mean or stupid,[9] an endeavor utterly inconsistent with this Court's emphasis on meaningful safeguards to prevent excessive punitive damage awards. See *Haslip*, 111 S. Ct. at 1046 (under Alabama's punitive damages procedure, award "did not lack objective criteria"). This subjective and standardless review cannot be said to provide "an additional check on the jury's or trial court's discretion." *Id.* at 1045.

It is well established that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio V. Pennsylvania*, 382 U.S. 399, 402-03 (1966). No such legally fixed standards inhere in the newly minted "really mean"/"really stupid" defendant test. A defendant thus has no indication of what sort of behavior may arbitrarily be labeled as "really mean," a characterization that will unconstitutionally result in a punitive award that is virtually unlimited.

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[8] As the West Virginia Supreme Court itself admitted, it is "difficult to distinguish" between "really mean" and "really stupid" defendants subject to punitive damages awards. App., *infra*, 36a n.11. These inherently subjective categories clearly provide no legitimate basis for restricting damages to five times the compensatory award in one case, but permitting an effectively boundless punitive award in the other.

[9] Two justices of the West Virginia Supreme Court recognized the subjective nature of the "really mean"/"really stupid" test, and concurred separately to disassociate themselves from that "ridiculous categorization." App., *infra*, 53a-54a.

While the court in this case has adopted an extreme and indefensible interpretation of what *Haslip* permits and requires with respect to excessiveness of punitive awards, the problem of deciding what *Haslip* means is widespread among the lower courts, both state and federal. The results in scores of cases purporting to apply *Haslip* are deeply troubling. The excessive punitive damages awards that alarmed this Court, see *Browning-Ferris Indus. V. Kelco Disposal, Inc.*, 492 U.S. 257, 280-81, 282 (1989) (Brennan, J., joined by Marshall, J., concurring) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); *Bankers Life & Casualty Co. V. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment); *City of Newport V. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (Brennan, J., joined by Marshall, J., and Steven, J., dissenting), continue virtually unabated. [10] It is disconcerting that many lower courts have interpreted *Haslip* as providing blanket approval of nearly every punitive damages award and scheme.[11]

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[10] *See, e.g.*, *Glasscock V. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (compensatory damages $317,625, punitive damages $6.1 million), *cert. denied*, 112 S. Ct. 1778 (1992); *Oberg V. Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App.) (Jury awarded $919,391 in compensatory damages and $5 million in punitive damages. Compensatory damages were reduced by 20% based on comparative fault, but punitive award left unchanged.), *review granted*, 822 P.2d 1194 (Or. 1991). Even where remittitur has been ordered, punitive awards often remain enormous. *See, e.g.*, *General Motors Corp. V. Johnston*, 592 S. 2d 1054 (Ala. 1992) (compensatory damages of $75,000, punitive damages of $7.5 million as remitted); *Burke V. Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (compensatory damages of $390,000, punitive damages of $28 million as remitted).

[11] *See, e.g.*, *Coyne V. Allstate Ins. Co.*, 771 F. Supp. 673, 680-81 (E.D. Pa. 1991) (stating that Pennsylvania appellate courts provide the sort of "additional check on the . . . trial court's discretion" found crucial

These cases nod at, rather than heed, the message of *Haslip* that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury." *id.* at 1043, are critical in ensuring that a punitive damages award falls on the acceptable side of a constitutional dividing line. A punitive damages award made with "unlimited jury discretion --or unlimited judicial discretion for that matter," *id,*, must indisputably fall "into the area of constitutional impropriety." *Id.* at 1046. If the intention of the Court in *Haslip* was to establish that all courts must give serious content to the Due Process Clause when approving punitive awards, that purpose has not been achieved. Accordingly, the Court should grant review in this case to make plain that *Haslip* and the Due Process Clause require genuine constraints on jury and judicial discretion, and that the vague, newly invented "test" for punitive damages awards announced by the West Virginia Supreme Court in this case provides no such constraints.

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in *Haslip* even though the standards applied are abuse of discretion or the reviewing court's determination of excessiveness); *Commonwealth Lloyd's Ins. Co. V. Thomas*, 825 S.W.2d 135 (Tex. Ct. App. 1992) (affirming $2 million punitive damages award based solely on adequacy of jury instruction, without requiring trial court review or conducting appellate review of the factors given to the jury), *writ of error filed* April 22, 1992; *Wolf V. Goodyear Tire & Rubber Co.*, 808 W.W.2d 868 (Mo. Ct. App. 1991) (holding Missouri procedure constitutional under *Haslip* although review for "excessiveness" conducted without articulated standards); *Oberg V. Honda Motor Co.*, *supra* note 10 (approving Oregon procedure under *Haslip* notwithstanding the state constitution permits reversal of jury awards of punitive damages only when the reviewing court finds a lack of *any* evidence supporting the award); *K-Mart Corp. V. Pearson*, 818 S.W.2d 410, 417 (Tex. Ct. App 1991) (intermediate appellate court concluded without analysis that "the trial court's instruction did not give the jury unlimited discretion" under *Haslip*, and "found [the punitive damages award] to be reasonable").

2. Even at first blush, the wide 526-to-one ratio in this case, which involved no personal injury of any sort, must immediately "jar one's constitutional sensibilities." *Id.* at 1043. In *Haslip*, where the ratio of punitive to compensatory damages was four to one, this Court stated that the "monetary comparison[] [was] wide," and might be "close to the line" of constitutional acceptability. *Id.* at 1046. This case, where the punitive damages are 526 times greater than the compensatory damages, is unquestionably out of bounds. In a case involving an alleged business tort, where no actual damages to the property right at issue were found,[12] a $10 million punitive damages award can scarcely be said to bear anything remotely approaching a "rational" relationship to the underlying $19,000 award. 111 S.Ct. at 1045-46. Moreover, it stretches credulity to believe that an award of $10 million is required to deter TXO or other companies from taking similar actions in the future. While some state and federal courts have reached precisely that conclusion in holding *less* excessive awards to be unconstitutionally disproportionate, other courts have, like West Virginia, interpreted *Haslip* to allow virtually limitless punitive damages.[13] The conflicting decisions highlight the need for this Court's review.

Alexander & Alexander, Inc. V. B. Dixon Evander & Associates, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992), is directly inconsistent with the West Virginia court's decision. There, an insurance agency and its agent were held liable for conspiracy and tortious interference with contracts held by the plaintiff, a self-employed insurance agent. The jury awarded $250,000 in compensatory damages and $40 million in punitive damages, a ratio of 160 to one. Although the trial court found the punitive damages award to be excessive, and remitted it to $12.5 million, 596 A.2d at 704, the Maryland Court of Special Appeals vacated that award and remanded for a new trial on punitive damages. The court found the punitive award -- which as remitted was still 50 times the compensatory award -- unconstitutional under *Haslip*:

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[12] The "compensatory" award consisted of only the attorneys' fees expended by respondents in defending against TXO's declaratory judgment action. *See* App., *infra*, 20a-21a.

[13] *See supra* note 10.

> Not only is the $12.5 million allowed by the [trial] court extraordinary in terms of Maryland history, it is far in excess of the actual harm caused to [plaintiff], representing nearly fifty times the essentially liquidated compensatory damage . . . . If the $840,000 awarded in *Haslip* came "close to the line" in terms of the -actual loss suffered, this surely crosses that line.

596 A.2d at 710-11. Accord, *Medical Mut. Liab. Ins. Soc. V. B. Dixon Evander & Assocs., supra* (Same underlying facts as in *Alexander & Alexander*, with compensatory damages of $1,725,000. Punitive damages award of $7 million vacated and remanded for retrial).

Importantly, in reversing punitive damages awards as unconstitutionally excessive, *Alexander & Alexander* and *Medical Mutual* both emphasized that the harm arose out of a business tort, not involving loss of life or limb or threat to public health and safety. Thus, the court in *Alexander & Alexander* noted the "[t]his was, at bottom, a commercial dispute between two business competitors." 596 A.2d at 710. A different panel of that court similarly found that the "commercial dispute that triggered the awards of punitive damages was not 'very high on the scale of reprehensibility.'" *Medical Mutual*, 1992 Md. App. LEXIS 144 at *49 (quoting *Alexander & Alexander*).

That characterization, of course, applies equally to the instant case. This case involves slander of title to property; TXO did not "endanger the public health or safety [and] its conduct was not life-threatening to anyone." *Alexander & Alexander*, 596 A.2d at 711. Thus, even a ratio far lower than 526 to one is inconsistent with constitutional norms. The approval of this award by the West Virginia Supreme Court is simply indefensible.

Even where the underlying conduct has involved egregious personal injuries or public safety risks, court have found awards in ratios much smaller than the 526-to-one ratio here to be excessive. In *Mason V. Texaco, Inc.*, 948 F.2d 1546 (10 Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), for example, the jury awarded a total of $9,025,000 in compensatory damages and $25 million in punitive damages against the defendant, a producer of a carcinogenic substance that caused the plaintiff to develop and eventually die from leukemia. The jury found that the defendant knew or should have known of the dangers, and that it was wholly at fault for its negligent failure to ensure adequate warnings. The court of appeals found that the $25 million punitive award, 2.77 times larger than the compensatory award, was so excessive as to "shock the judicial conscience." *Id.* at 1561. In so finding, the court found fault with the fact that the "staggering sum" of $25 million bore "no necessary relation to the actual harm caused." *Id.* (quoting *Gertz V. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). The court remanded with directions to enter remittitur to one-half the award, $12,500,000. *Id.*[14]

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[14] *General Motors Corp. V. Johnston, supra* note 10, was a product liability and wrongful death case brought when a defective engine in a brand-new Chevrolet truck stalled in an intersection, and a seven-year-old passenger was killed in the resulting collision. The evidence showed that General Motors knew of the defect, but did not notify any

Haslip has unquestionably received mixed reactions by the lower courts. It has rightly been interpreted by some to place meaningful limits on the relationship between punitive and compensatory awards. It also has been interpreted to permit virtually limitless punitive awards. In sum, the issue has been allowed to percolate long enough in the lower courts. This case represents an extraordinary example of an overly lenient approach to excessiveness review and therefore provides an excellent vehicle for the Court to give further guidance on the precise meaning of its holding in *Haslip*.

3. In *James B. Beam Distilling Co. V. Georgia*, 111 S. Ct. 2439 (1991), this Court held that a newly announced rule of federal law may not be applied in a "selectively prospective" fashion. In other words, it is no longer permissible to extend the benefits of a newly declared federal rule to the litigants in the case announcing the rule, but not to those whose cases arose on facts predating the pronouncement. Rather, under such circumstances, the rule must be applied retroactively. *Id.* at 2448. The West Virginia Supreme Court's decision in this case is contrary to that principle. This Court should grant review to clarify that the holding in *James Beam* applies to a state court insofar as the state court is interpreting and applying federal law.

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of its customers in order to avoid expending the substantial sums necessary to recall and replace the defective part. The jury awarded $15 million in punitive damages and $75,000 in compensatory damages, a ratio of 200 to one. *Id.* at 1057. The awards were reviewed and approved by the trial court in accord with the Alabama standards validated in *Haslip*. The trial court could "find no reported decision in Alabama where a defendant's conduct even approached the degree of reprehensibility of Defendant General Motors' conduct in this case." *Id.* at 1061. Yet, upon review, the Alabama Supreme Court held that a remittitur to one-half the punitive award, $7.5 million, was required, *id.* at 1064, because punitive damages "should not exceed an amount that will accomplish society's goals of punishment and deterrence." *Id.* at 1063.

In *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court first analyzed the West Virginia procedure for awarding punitive damages in light of this Court's decision in *Haslip*. Finding that procedure to inadequate under federal law as enunciated in *Haslip*, the court announced new procedural guidelines to bring West Virginia's punitive damages scheme into compliance with federal law. 413 S.E.2d at 908. The litigants before the court in *Garnes* had not had the protection of those guidelines: accordingly, the West Virginia court remanded that case for a new trial to be conducted under the new federal constitutional requirements it had articulated. *Id.* at 910-11.

In this case, as well, TXO was not protected by the procedural guidelines held to be constitutionally required in *Garnes*. Yet, the West Virginia Supreme Court did not remand the case as it did in *Garnes*. The result of the application of federal due process law to TXO in the West Virginia Supreme Court was thus wholly at odds with what would have happened in a federal court.

This Court's decision in *Felder V. Casey*, 487 U.S. 131 (1988), indicates that the Constitution forbids this result, and requires state courts to apply the principles of *James Beam* to state decisions announcing or implementing new rules of federal law. In *Felder V. Casey*, which involved a federal civil rights action under 42 U.S.C. § 1983, the government defendants asserted that the suit could not be entertained because the plaintiff had failed to comply with Wisconsin's notice-of-claim statute. 487 U.S. at 135-36. That statute provided that no action might be brought against any state officer unless the claimant had provided, within 120 days of the alleged injury, written notice of the claim and the relief sought. *Id.* at 136-37. On appeal, the Wisconsin Supreme Court agreed, and the case was dismissed. *Id.* at 137-38.

This Court reversed. Notwithstanding that "States may establish the rules of procedure governing litigation in their own courts," a "federal right cannot be defeated by the forms of local practice.'" *Id.* at 138 (quoting ***Brown V. Western Ry.***, 338 U.S. 294,296 (1949)). The Court concluded that because enforcement of the provision "will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court," the notice-of-claim provision was unconstitutional. *Id.* at 138-151.

The same reasoning must undermine the West Virginia Supreme Court's decision in this case that the procedural safeguards established as a matter of federal constitutional law in *Garnes* need not be retroactively applied. As *Felder* illustrates, it is impermissible for state procedural rules to burden a litigant's federal right. Surely the constitutional infirmity is even clearer where a state court's concern with judicial economy results in such a burden. See App., *infra*, 32a ("TXO would have us remand this case for a new trial on the punitive damages issue because all of the technical requirements set forth in . . . *Garnes* were not met. To adopt such an approach to *Garnes* would unnecessarily send far too many cases back for retrial."). The West Virginia court's analysis cannot be reconciled with *James Beam* and *Felder*, and certiorari should be granted in order for this Court to make clear that the holding of *James Beam* is fully applicable in the state courts.

Moreover, at least one court has already taken a conflicting view of the mandated course for a state court where it has applied a new federal-law ruling to the litigants before it. In *Seyller V. Pierce & Co.*, 816 S.W.2d 577 (Ark. 1991), a supplier wishing to impose a materialman's lien for which he had not given prior notice invoked

Arkansas's "commercial construction" exception to the statutory notice requirement for such a lien. The Arkansas Supreme Court had "recently held the commercial construction exception to the notice requirement unconstitutional on equal protection and due process grounds." *Id.* at 580 (citing *Urrey Ceramic Tile Co. V. Mosley*, 304 Ark. 711, 805 S.W.2d 54 (1991)). The court held that it was required, as a threshold matter, to "decide whether at apply *Urrey* retroactively to this case which was pending before us when *Urrey* was decided." *Id.* The Arkansas court recognized an obligation under *James Beam* that, having "applied a rule of law to the litigants in one case, it must apply the same rule of law to all other litigants not barred by procedural requirements or *res judicata*." *Id.*[15]

This Court should thus grant review in order to prevent an unconstitutional rift between state and federal courts in their approaches to retroactive application of rulings on federal law. As the decision of the Arkansas Supreme Court in *Seyller* shows, review is also merited to prevent such a rift among the state courts.

---

[15] The Arkansas court found, however, that the case before it differed from *James Beam* because "appellants [were] barred by the procedural requirement of preserving an issue in the trial court for [Supreme Court] review." *Seyller V. Pierce & Co.*, 816 S.W.2d 577, 580 (Ark. 1991). It was thus on the basis that there was a procedural bar that the Arkansas court held it need not apply its earlier decision. *Id.* at 580-81. Here, of course, there is no procedural bar. TXO argued in its motion for judgment *n.o.v.* that it had been denied due process because of the absence of meaningful standards for the jury and the trial court. App., *infra*,56a-69a. On appeal, TXO made the same argument to the West Virginia Supreme Court, which determined that the case need not be remanded. App., *infra*, 32a-33a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX B

IN THE COURT OF APPEALS FOR THE SIXTH JUDICIAL DISTRICT OF TEXAS AT TEXARKANA

NO. 06-90-00014-CV
FIBREBOARD CORPORATION, et al,
Appellants,
V. (CONSOLIDATED)
REUBEN S. POOL, et al,
Appellees.

NO. 06-90-00022-CV
FIBREBOARD CORPORATION, et al,
Appellants,
V. (CONSOLIDATED)
LESSIE L. WILLIAMS, et al,
Appellees.

BRIEF OF APPELLEES

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT
COURT OF RUSK COUNTY, TEXAS
THE HONORABLE DONALD R. ROSS,
JUDGE PRESIDING

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Defendants/Appellants

The Celotex Corporation
Fibreboard Corporation
Owens-Illinois, Inc.
The Flintkote Company
H.K. Porter Company, Inc.
Garlock, Inc.

REPLY POINTS XXI, XXII:

> **THE AWARDING OF PUNITIVE DAMAGES, UNDER TEXAS LAW, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR THE DUE PROCESS CLAUSE OF SECTION 19, ARTICLE I, OF THE TEXAS CONSTITUTION. (Reply to Points of Error: Owens-Illinois, XXI, XXII; Celotex, XIX, XX; Fibreboard, VIII; Flintkote, VIII.)**

REPLY POINT XXIII:

> **TEXAS COMMON LAW TRADITIONALLY ALLOWS FOR THE RECOVERY OF PUNITIVE DAMAGES WHEN THE CONDUCT OF THE DEFENDANT IS INTENTIONAL, WILLFUL, OR WITH A CALLOUS OR HEEDLESS DISREGARD FOR THE SAFETY OF OTHERS OR GROSSLY NEGLIGENT. (Reply to Owens-Illinois Point of Error XXIII.)**

All of the constitutional arguments presented by these defendants in this appeal have been previously decided adverse to their position by the Federal Court of Appeals, Fifth Circuit. *Jackson v. John-Manville Sales Corp.* 727 F.2d 506; *rehearing granted en banc, opinion withdrawn*, 750 F.2d 1314 (5th Cir. en banc 1985); 781 F.2d 394 (5th Cir. 1986); *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036 (5th Cir. 1985); *Aguirre v. Armstrong World Industries, Inc.*, No. 88-7036, May 25, 1990; *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990).

The right of plaintiffs to recover punitive damages in the context of "mass asbestos litigation" has been affirmed by the Fifth Circuit in the cases of *Jackson*, 727 F.2d 506, *rehearing granted en banc, opinion withdrawn*, 750 F.2d 1314 (5th Cir. 1985), *Hansen*, 734 F.2d 1036 (5th Cir. 1985), and *King*, 906 F.2d 1022, (5th Cir. 1990). The Fifth Circuit, in deciding a Texas diversity case involving asbestos, wrote:

> . . .*Texas law does not preclude*, but, in fact, apparently grants the right to punitive damages awarded in favor of products liability plaintiffs, *even in context of mass asbestos litigation with potential for multiple* punitive damages awards against a defendant. *Hansen*, 734 F.2d 1036, citing Art. 16, § 26, Vernon's Ann. Texas Const.

Nevertheless, the defendants continue to urge a due process argument citing a District Court opinion in New Jersey, *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D.N.J. 1989). The defendants' argument appears to be based on a substantive component of due process, as opposed to procedural due process guarantees. Obviously, the requirements of procedural due process, i.e., notice of claim, right to confront and cross-examine witnesses, right to be heard at a meaningful time and manner, are satisfied by the complete evidentiary trial. Substantive due process essentially requires that any judicial proceeding be fundamentally fair.

Unlike New Jersey and apparently some other state, Texas common law provides for *fundamental fairness and safeguards* in the award of punitive damages. Texas law requires that punitive damages must bear a *reasonable proportion* to actual damages awarded. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). In addition, Texas law requires the District Court in reviewing *excessiveness* of the amount of punitive damages awarded to consider the following factors: 1) the nature of the wrong; 2) the character of the conduct involved; 3) the degree of culpability of the wrongdoers; 4) the situation and sensibilities of the parties; and 5) the extent to which the defendant's conduct offends the public sense of justice and propriety. *Maxey v. Freightliner Corp.* 665 F.2d 1367 (5th Cir. 1984) at 1377; *Alamo National Bank v. Kraus*, 616 S.w.2d 908 (Tex. 1981). The very purpose of these rules and guidelines is to serve as a gauge for the Court in determining the effect of bias, prejudice and passion on the jury and, thus, the fundamental fairness of the process. *Nabours v. Longview Savings & Loan Assoc.*, 28 S.Ct.J. 571 (Tex. 1985); *Nolan v. Bettis*, 577 S.W.2d 551 (Tex. Civ. App.-Austin, 1979, writ ref'd, n.r.e.).

In a United States Supreme Court recent opinion on punitive damages, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989) the Court discusses due process requirements of the Fourteenth Amendment. The Court states:

> The parties agree that due process imposes *some* limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But the Petitioners make no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice. Instead, they seek further due process protections, addressed directly to the size of the damages award . . . but we have never addressed the precise question presented here: Whether due

> process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.

Id. at 2921. The Court states that Petitioners failed to properly raise that issue. However, the elements of concern considered by the Court are all protected under current Texas law. Under Texas law, as previously demonstrated, the jury does not have undue discretion but, rather, any award is carefully scrutinized by the trial judge and the size of the award must comply with the "reasonable relation" rule and be reviewed according to the *Alamo*, 616 S.W.2d 908, factors.

In the present case, the defendants do not urge that this award is excessive or violative of any of the Texas guidelines. They do not claim that the punitive award was the product of bias or passion, or that the award was the product of an unfair proceeding. The simple fact is that Texas law provides the defendants all of the substantive and procedural protection of the Fourteenth Amendment.

The Texas procedures give strict guidelines to be followed by the Trial Court and Appellate Courts in reviewing the amount awarded by a jury in punitive damages. This jury awarded punitive damages for conduct related to specific damages sustained by specific plaintiffs. The defendants did not offer evidence of the national scope of the asbestos problem, nor does state or federal law allow one jury to decide punishment for "all of the injured plaintiffs, in the nation." If, in fact, this jury would have been allowed to award punitive damages for the injury to 70,000 plaintiffs, these same defendants would have complained that the award should not be allowed because it is not "reasonable in relation to actual damages found" for all 70,000 plaintiffs. The safeguard in the Texas system is that a plaintiff must prove and recover a specific amount of actual damages for *his* injuries and the punitive damages *must* be "reasonably proportionate" to those damages. A defendant that has caused death and disease in thousands of workers should not be allowed to choose the award of punitive damages it desires to pay one plaintiff and foreclose the rights of all other plaintiffs guaranteed by the Texas Constitution. Finally, the defendants urge that, for some of them, the conduct complained of stopped years ago and, therefore, the deterrence purpose of punitive damages has been served. Such an argument suggests that a company can engage in grossly negligent conduct killing thousands of people, but avoid punishment simply by stopping the conduct or by killing too many people. This very shallow argument has far reaching consequences for Texas law. For example, a company that hires a driver with a known record of drunkenness causing accidents, could avoid punishment and, thus, deterrence, by simply firing the driver before punitive damages are rendered and claim no deterrence was necessary. The policy of deterrence underlying punitive damages or punishment is not solely for the individual or entity engaging in the conduct but, rather, to prevent others from engaging in the same or similar conduct. For purely policy reasons concerning the safety of the public, a company that engages in conduct causing death and disease in 70,000 people should not be able to claim avoidance of punishment and deterrence because one plaintiff received punitive damages for *his injuries*. The argument of the defendants make a mockery of deterrence, fairness and justice for innocent and unknowing workers. For these reasons, Texas law has always recognized the right of an individual to seek punitive damages when the conduct of the defendant is grossly negligent. Texas law provides fundamental fairness in the adjudication of a claim for punitive damages and safeguards concerning the amount of damages awarded. No violation of the Constitutions of the United States or Texas have been demonstrated and these points must be denied.

REPLY POINT XXIV:

THE PUNITIVE DAMAGE AWARD DOES NOT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE TEXAS CONSTITUTION. (Response to Celotex Point of Error XXI.)

Celotex cites to this Court, the case of *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980), for authority and a test for determining whether a civil penalty is unconstitutional. Unfortunately, Celotex does not provide the entire test provided by the Court. When the entire test of *Pennington* is considered, the punitive damage award of this jury and Texas law concerning punitive damages, clearly do not violate Art. I §§ 13 and 19.

In *Pennington*, the Texas Supreme Court stated:

> A primary consideration in determining whether a fine is excessive, is whether it is *fixed with reference* to the object it is to accomplish . . . (The trebling provision) indicates an attempt by the legislature to proportion damages *according to the seriousness of the wrong* . . . the *defendant's culpability* or lack thereof is an important consideration.

Once again, Celotex is not urging before this Court that the jury award of punitive damages *in this case* was excessive. Furthermore, Texas law concerning punitive damages, as previously demonstrated, contains the very requirements of the *Pennington* case. Punitive damages must be *reasonable in relation* to actual damages awarded. The District Court must consider 1) *the nature of the wrong*; 2) the character of the conduct involved; 3) the degree of *culpability of the wrongdoer*; 4) the situation and sensibilities of the parties; and 5) the extent to which the defendant's conduct *offends the public's sense of justice and propriety*. *Alamo National Bank v. Kraus*, 616 S.W.2d 908; *Nabours v. Longview Savings & Loan Assoc.*, 28 S.Ct.J. 571.

These factors are exactly the same factors the Court considered in *Pennington* and found that the Deceptive Trade Practices Act was not unconstitutional. The Court states:

> The declaration in the Constitution that fines shall not be excessive makes it a question for the Court to decide under the facts of *each particular case*. (authorities omitted) (*Pennington v. Singleton*, 606 S.W.2d at 690.)
>
> A fine is not unconstitutionally excessive and the Courts will not override the legislature's discretion, except in extraordinary cases, where it becomes so *manifestly violative* of the constitutional inhibition as to *shock the sense of mankind*.

The damages awarded by this specific jury for these specific injuries is not alleged by any defendant as so excessive to "shock the sense of mankind." The Court, in *Pennington*, found the recovery increased in a *fixed proportion* to his *actual loss*. This indicated an attempt to proportion damages according to the "seriousness of the wrong." Here, the punitive damages awarded were required to be "reasonable in relation" to actual damages found.

Nabours, supra. The trial court, in reviewing the award, had to consider the *Alamo National Bank*, 616 S.W.2d 908, factors which specifically include the "seriousness of the wrong" and the "degree of culpability." Finally, as in *Pennington*, 606 S.W.2d at 691, the prohibited conduct, failing to warn, was described with "reasonable certainty, furthering the policy of fairness to the defendant."

Consequently, this Court must overrule this point of error.

REPLY POINT XXV.

THE TRIAL COURT PROPERLY SUBMITTED THE JURY QUESTIONS CONCERNING LIABILITY AND COMPARATIVE CAUSATION. (Reply to Celotex Point of Error, XI.)

Defendants complain with regard to the manner of submission of Jury Question Nos. 2 through 13 contained in the verdict forms of all five plaintiffs. For the Court's convenience, these verdict forms are set forth in the record, as follows:

1) George William - Williams Tr., vol. 20 at 2404-2451;

2) Donald Freeman - Pool Tr., vol. 36 at 4392-4437;

3) Thomas Sledge - Pool Tr., vol. 36 at 4438-4485;

4) Reuben Pool - Pool Tr., vol. 36 at 4486-4531; and

5) Charles Strong - Pool Tr., vol. 37 at 4534-4579.

The defendants urge that the trial court's manner of submission somehow violates the Texas Supreme Court's holding in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). As defendants point out, the Texas Supreme Court did suggest a general form to be adapted to the specific allegations of each case--for use in the allocation and determination of each party's percentage of comparative causation. *Id.* at 427, n.8. Contrary to the assertions of defendants, the comparative causation question (Question No. 16) in the verdict form of *each* plaintiff was submitted to the jury in the manner suggested by *Duncan*. *See*, Williams Tr., vol. 20 at 2426-2428; Pool Tr., vol. 36 at 4423-4426, 4470-4473, 4517-4520; Pool Tr., vol. 37 at 4565-4568. In fact, contrary to the recommendation by *Duncan*, the plaintiff's name in each of the five comparative causation questions was listed *first*, not last. In light of the foregoing, or allocate causation against other manufacturers. The defendants failed in their burden of proof and the award of the jury coincides with the testimony elicited.

REPLY POINT XXVIII:

THE TRIAL COURT CORRECTLY SUBMITTED JURY QUESTIONS ON THE AMOUNT OF PUNITIVE DAMAGES TO BE AWARDED CONDITIONED FIRST ON A FINDING OF REQUISITE MENTAL STATE FOR ASSESSMENT OF PUNITIVE DAMAGES. (Reply to Celotex Point of Error, XVIII.)

REPLY POINT XXIX:

THE TRIAL COURT PROPERLY SUBMITTED THE EXEMPLARY DAMAGE JURY QUESTIONS. (Reply to Point of Error: Garlock, IV, Flintkote, VII.)

In reviewing this argument of Celotex, this Court is, again, guided by an abuse of discretion standard of review. Furthermore, only a *direct comment* on the weight of the evidence presents reversible error. *Briseno v. Martin*, 561 S.w.2d 794, 796-797 (Tex. 1977). A direct comment on the wright of the evidence is one which suggests to the jury the trial judge's opinion concerning the matter about which the jury is asked. *City of Amarillo v. Langley*, 651 S.W.2d 906, 915 (Tex. App.-1983, no writ). The validity of an objection to any portion of a charge requires an examination of the charge in its entirety. *Pickens v. Harrison*, 252 S.W.2d 575 (Tex. 1952); *Texas Employers' Ins. Ass'n. v. McKay*, 210 S.W.2d 147 (Tex. 1948).

The argument of Celotex completely ignores the charge. The very first question in the charge for each of the plaintiffs asks if they sustained an asbestos-related injury. The question complained of by Celotex is Question No. 20 and is conditionally submitted on a finding first by the jury if the defendants *acted* willfully, intentionally, or with a callous or reckless and heedless disregard and indifference to the rights and welfare of the plaintiffs. Only if the jury answered "yes" to Question 19, finding such conduct, would the jury answer what sum of money, *if any* should be assessed as exemplary damages. Williams Tr., vol. 20 at 2447-2449; Pool Tr., vol. 36 at 4433-3335, 4479-4481, 4526-4528; Pool Tr. vol. 37 at 4574-4576.

The jury was not asked to award punitive damages to compensate the plaintiffs but, rather, after a specific finding concerning the conduct of the defendants, to award an amount, if any, as exemplary damages. The language of the series of issues, and the instruction of the court, properly focused the attention of the jury on the conduct of the defendant and Texas law concerning exemplary damages.

The questions does not assume injuries to the plaintiffs--the jury had already found an injury to the plaintiffs. Furthermore, the issue does not in any manner indicate a *direct comment* or opinion of the trial judge. Therefore, this point of error should be overruled.

Defendants allege that the submission of the exemplary damage questions contained within the various verdict forms "completely blurs the distinctions between the basis for actual damages . . .and the basis for exemplary damages . . . "(Brief of Appellant, Garlock, Inc., at 23) and "erroneously transformed punitive damages into a cumulative form of compensatory damages" (Brief of Appellant, The Flintkote Company, at 38). Nothing could be further from the truth. *Each* of these jury questions contained the following definition:

> "'**EXEMPLARY DAMAGES**' means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damages."

Williams Tr., vol. 20 at 2449; Pool Tr., vol 36 at 4435, 4481, 4528; Pool Tr., vol. 37 at 4576.

This correct, properly--worded definition clearly outlines the purposes which support and justify the imposition of exemplary damages--deterrence (". . .as an example to others. . .") and punishment (". . .as a penalty or by way of punishment . . ."). This definition if precisely the one suggested by **3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES** (Second Edition, 1990) Sec. 80.06. Contrary to the tenuous arguments of defendants, the exemplary damage definition plainly pointed out to the jury that any amount awarded as exemplary damages would be " . . . *in addition to any amount you may have found as actual damages*." Consequently, there was no "erroneous standard" presented to the jury, nor was there any violation of **TEX. R. CIV. P. 277**.

In *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App.-Corpus Christi 1986), *vacated and remanded*, 754 S.W.2d 646 (Tex. 1988), the appellate court addressed a jury question" which asked the jury to find what sum of money, if any, should be assessed as exemplary damages against [the defendant] *for the death of* [the decedent]." *Id.*, at 334 (emphasis by the court). The Court of Appeals stated "[e]ven though we find that the issue in question might have been worded differently, *it was not improper*." *Id.* (emphasis added). Plaintiffs point out, however, that the *Durrill* case was subsequently settled, which vacated the Court of Appeals' judgement and resulted in the remand of the case to the trial court. *Durrill v. Ford Motor Co.*, 754 S.W.2d 646 (Tex. 1988).

Additionally, defendants again attempt to mislead this Court by misstating the propositions and holdings of their allegedly supportive case law. For example, defendants cite *French v. Grigsby*, 567 S.W.2d 604, 608 (Tex.Civ. App.-Beaumont 1978, writ ref'd n.r.e.), in support of the allegation that:

> ". . . this charge erroneously transformed punitive damages into a cumulative form

> of compensatory damages, thus inviting the jury to award damages a second time for injuries already considered under the heading of compensatory damages."

Brief of Appellant, The Flintkote Company, at 38-39.

French did not address, nor even mention, exemplary damages. Rather, the dispute in that case centered on the submission of a "physical impairment" actual damage element and a jury instruction concerning the *actual* damage issues. *French*, 567 S.W.2d at 606,608.

Defendants also cite *Briseno v. Martin*, 561 S.W.2d 794, 796-797 (Tex. 1977) as supportive authority. In *Briseno*, the argument was made that a jury question impermissibly commented on the weight of the evidence because it was not submitted conditionally upon a finding that the driver was reckless. *Id.* at 796. The Texas Supreme Court held that this jury question did comment on the weight of the evidence, *but* the comment was only incidental because, in the preceding question, the jury specifically found that the driver was reckless. *Id.* at 797. Plaintiffs have already shown that the exemplary damage jury questions were properly conditionally submitted upon the "state of mind" question immediately preceding each exemplary damage question. Therefore, per *Briseno*, the allegedly "improper "comments on the weight of the evidence" cited by defendants herein constitute--at most--incidental comments and are *not* violative of **TEX. R. CIV. P. 277**.

Furthermore, not every comment--even a direct one--is a ground for reversal. The comment must also be one that probably caused the rendition of an improper verdict. *Alvarez v. Missouri-Kansas-Texas Railroad Co.*, 683 S.W.2d

375 (Tex. 1984), at 377; *Hirdler v. Boyd*,702 S.W.2d 727 (Tex. App. - San Antonio 1985, no writ), at 730. Even if this Court determines that the exemplary damage jury questions contained improper comments, the existence of such comments did *not* cause the rendition of improper verdicts in these actions. The correct definition of "exemplary damages" was included in each of the questions--this definition plainly stated the basis and purpose of exemplary damage awards; this definition also clearly emphasized that any amounts awarded as exemplary damages were *in addition to* the amounts awarded as actual damages. The jury understood the differences and voluntarily determined exemplary damages were justified.

APPENDIX C

NO. D-1376
IN THE SUPREME COURT OF TEXAS

NO. 06-90-00014-CV
FIBREBOARD CORPORATION, et al
Petitioners,
v. (CONSOLIDATED)
REUBEN S. POOL, et al,
Respondents.

NO. 06-90-00022-CV
FIBREBOARD CORPORATION, et al
Petitioners,
v. (CONSOLIDATED)
LESSIE L. WILLIAMS, et al,
Respondents.

BRIEF IN RESPONSE TO APPLICATIONS FOR WRIT OF ERROR

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III. THE COURT OF APPEALS PROPERLY AFFIRMED THE AWARD OF PUNITIVE DAMAGES AGAINST CELOTEX, OWEN-ILLINOIS, FIBREBOARD AND FLINTKOTE BECAUSE TEXAS LAW DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR THE DUE PROCESS CLAUSE OF SECTION 19, ARTICLE I OF THE TEXAS CONSTITUTION. (Reply to Points of Error: Celotex V; Owens-Illinois III; Fibreboard I, III; Flintkote II.)

IV. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE PETITIONERS' COMPLAINT OF THE AWARD OF PUNITIVE DAMAGES AGAINST THE PETITIONERS BECAUSE THE PETITIONERS WAIVED ANY CHALLENGE TO THE AWARD BY FAILING TO OBJECT OR DEMONSTRATE THAT THE AWARD WAS EXCESSIVE. (Reply to Points of Error: Celotex V; Owens-Illinois III; Fibreboard I, III; Flintkote II.)

In consideration of the Petitioners' contentions concerning punitive damages, it must be noted that none of the Petitioners claimed before the Court of Appeals that the specific award of this jury was excessive in relation to the actual damages awarded these specific plaintiffs. Furthermore, none of the Petitioners asserted or claim that plaintiff does not have the right to recover punitive damages in a failure to warn product liability action where gross negligence is found by the jury. Consequently, for this appellate review it must be admitted that the amount of the award of this jury as it relates to these specific plaintiffs was reasonable and is not excessive.

The Petitioners, Celotex, Owens-Illinois and Fibreboard, contend that the potential for multiple awards of punitive damages against them violates due process. The Petitioner, Flintkote, contends that the procedural rules and guidelines contained in Texas common law violate due process. Additionally, Petitioners, Flintkote and Fibreboard, complain that the award of punitive damages was improper because of evidentiary concerns or that the Court of Appeals did not fully review the evidence with respect to the Supreme Court guidelines for review of the amount of damages awarded.

A. *The Supreme Court Does Not Have Jurisdiction of the Punitive Damage Complaint.*

This Court, in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), clearly reaffirmed the long standing rule of appellate review of excessiveness of a punitive damage award. The Court stated:

> Whether the amount of damages awarded by the jury is excessive is a question of fact over which this Court has *no jurisdiction*.
>
> Whether the Court of Civil Appeals applied *an erroneous standard in determining the excessiveness of damages* presents a question of law within the jurisdiction of this Court.

Respondents would respectfully contend that absent a complaint in the Court of Appeals that the award of punitive damages was excessive, then any complaint related to the award which concerns the amount of damages awarded or the application or sufficiency of the guidelines for reviewing the award of punitive damages has been waived and this Court does not have jurisdiction to now consider either the award or the sufficiency of the guidelines to review an admitted reasonable award of punitive damages.

Clearly, a review of the Points of error raised before the Court of Appeals and assigned in the respective Motions for Rehearing, demonstrates that the Petitioners did not challenge and do not challenge the amount of the punitive damage award. Likewise, the Petitioner did not seek a remittitur of punitive damages. The Petitioners do not and did not challenge the right of the plaintiffs to recover punitive damages in a failure to warn action with a finding of gross negligence. Petitioners, Celotex and Owens-Illinois, do not now challenge the evidence or basis of the award of punitive damages. It is axiomatic that the Petitioners should not be allowed to challenge the sufficiency of the guidelines of review or the application of those guidelines if they fail to allege, complain or even attempt to demonstrate that the underlying award is, in fact, excessive.

The Petitioners cite as authority, the recent United States Supreme Court Opinion of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). Clearly, *Haslip* involved a due process challenge to a judgment awarding punitive damages following a complaint that the award was excessive. It was in context of that challenge that a review of the Alabama standards was made. Absent a challenge of the underlying award, there would have been no cause to review the Alabama procedures as they relate to a due process challenge. Therefore, this Court should deny the

Applications for Writ of Error as to these Points of Error because the Court lacks jurisdiction or because of waiver for failure to challenge the underlying award as excessive.

Since the amount or propriety of the award has not been challenged, the only constitutional questions presented are whether the potential for multiple awards violates due process or whether or not the Texas common law method of assessing punitive damages is per se unconstitutional and violates due process. Both of these issues have been previously reviewed and discarded by the United States Supreme Court and the Fifth Circuit Court of Appeals.

In fact, all of the constitutional arguments presented by these defendants have been previously decided adverse to their position by Federal Court of Appeals, Fifth Circuit and Petition for Writ of Certiorari denied by the United States Supreme Court. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506; *rehearing granted en banc, opinion withdrawn*, 750 F.2d 1314 (5th Cir. en banc 1985);781 F.2d 394 (5th Cir. 1986); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1985); *Aguirre v. Armstrong World Industries, Inc.*, 901 F.2d 1256 (5th Cir. 1990); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991); *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), (see attached copy as Appendix 1).

B. *The Potential of Multiple Punitive Awards or the Existence of Multiple Punitive Awards Does Not Violate Due Process.*

The Petitioners assert that this precise constitutional argument has not been previously reviewed or considered. In fact, it has been considered many times by the Fifth Circuit Court of Appeals and has recently been specifically refused by the United States Supreme Court by denying certiorari in *King*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991). (See Appendix 2 for a copy of the applicable portion of the Petition for Writ of Certiorari by Celotex in *King*, *Id.*) Additionally, it was specifically addressed, again, by the Fifth Circuit in *Glasscock*, *Id.* Opinion at 23.

The asbestos litigation began with a single plaintiff seeking recovery for his injuries in the case of *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869. The full extent for the death and disease caused by the manufacturers of products containing asbestos such as these Petitioners was not known at that time by the plaintiff and has still not been fully realized. Only the Petitioners knew the extent of the exposure throughout this country and the thousands they voluntarily and knowingly exposed to asbestos.

The punitive damage award and every punitive damage award has been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed nor could such an award be assigned. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual form minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded. This litigation is unlike most "mass torts," which involve a single catastrophe. This litigation involves individual exposure to individual products by thousands of men and women over decades.

Celotex, Owens-Illinois and Fibreboard urge that it is not this particular award that is objectionable but, rather, the combination of past awards the potential of future awards that violates due process. Thus, it argues, having one punitive damage award against it for one individual, all future plaintiffs' rights should be foreclosed. Such a holding by this Court, on this record, would arbitrarily discriminate between plaintiffs in product liability actions. In essence, such a holding would limit an award for punitive damages to the first plaintiff able to win the race to the courthouse and secure an award, or prohibit punitive damage claims after the defendant selected the award it wanted to pay. Clearly, had one plaintiff sought to recover for all future plaintiffs, the Petitioners would object that it violated the very Texas standards it complains of in this Application.

Interestingly, under this appellate record with the absence of a challenge that the award of this jury is excessive, Petitioners would have this Court overturn an award that has been admitted to be reasonable and based upon specific individual harm because another plaintiff in a different lawsuit with different injuries and damages was awarded punitive damages for his individual harm. Clearly, there is no principle of law that justifies that conclusion or action by this Court.

Not only does the Petitioners view of due process violate both due process and equal protection principles, it would completely defeat the purpose of punitive damages, which is to punish the wrongdoer and deter further wrongdoing. For example, if an early award of punitive damages, based on an individual's injury, as in these cases, was in the amount of $500, the defendant could voluntarily pay the award and destroy the very purpose of punitive damages. No longer would there be incentive to rectify the harm of defective products through recall, repair or warning. Nor should this Court arbitrarily decide for future "mass torts" at what level punishment is sufficient without any knowledge of the nature of the wrong, the degree of culpability of the parties, the character of the conduct, and the extent to which the defendant's conduct offends the public sense of justice and propriety. Petitioners argue that the potential for multiplicity of punitive damage awards should foreclose the right of those injured to recover punitive damages. In essence, their argument is that they injured and caused death in so many people that they should not be punished. A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of the harm, completely destroys the policy of deterrence.

Celotex claims that the purpose of punitive damages is negated because its potential liability *may* exceed its ability to pay and that it has now sought protection by voluntarily seeking bankruptcy. Simply because the amount of damages sustained by plaintiffs wrongfully injured *may* exceed the ability of the defendant to pay has never justified *elimination* of the right of recovery or the basis of recovery. No individual or corporation has the right to protection simply because its conduct was so reprehensible that it consciously and intentionally caused death and disease in 65,000 people. The conduct of the Petitioners consists of multiple acts over several decades against thousands of individuals. The amount of damages awarded *in this action* is specifically related to the amount of individual damage by each plaintiff.

The simple fact is that the Petitioners could have introduced evidence of prior awards paid in punitive damages for the jury's consideration and urge that it had been sufficiently punished. Instead, it chose not to tell the jury of any previous punitive award payment and then complained upon appeal that the award of the jury was unjust because of prior awards.

By affidavit, post-trial, the Petitioners, Celotex and Owens-Illinois, demonstrated only that two prior punitive damage awards had been paid. (Respondents have no way of determining the truth of the assertion.) This type of evidence has been rejected by the Second Circuit as failing to make an adequate record in the Trial Court to support a due process challenge. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2nd Cir. 1990), *cert. denied*, 111 S.Ct. 297, 112 L.Ed.2d 250; *Racich v. Celotex Corp.*, 887 F.2d 393 (2nd Cir. 1989).

In *Johnson v. The Celotex Corporation*, 111 S.Ct. 297, Celotex and Owens-Illinois, appealed an adverse judgment presenting this precise argument. Celotex offered no evidence of the amount of punitive damages paid. However, Owens-Illinois advised the Court it had paid $554,194 in punitive damages. The Second Circuit wrote, "there has been insufficient proof to demonstrate and *unjust result* of multiple imposition of punitive damages for the same course of conduct." *Id.*, at 1287. The Court continues, stating, "The record here simply is insufficient to permit an examination of the claim that there is a multiple award of punitive damages offensive to the fundamental fairness inherent in due process." *Id.*,at 1287, 1288. Such is the scenario now before this Court. The Petitioners have simply failed to maintain and present an adequate record that will support its due process arguments. Furthermore, the Petitioner, Fibreboard, has not demonstrated any award of punitive damages that it has paid.

This jury awarded punitive damages for conduct related to specific damages sustained by specific plaintiffs. The Petitioners did not offer any evidence of the national scope of the problem, nor does state or federal law allow one jury to decide punishment for "all of the injured plaintiffs in the nation." The safeguard in the common law system of assessing punitive damages is that a plaintiff must prove and recover a specific amount of actual damages for *his* injuries and the punitive damages *must* be "reasonably proportionate" to those damages.

Finally, the Petitioners urge that, for some of them, the conduct complained of stopped years ago and, therefore, the deterrence purpose of punitive damages has been served. Such an argument suggests that a company can engage in grossly negligent conduct killing thousands of people, but avoid punishment simply by stopping the conduct or by killing too many people. This very shallow argument has far reaching consequences for Texas law. For example, a company that hires a driver with a known record of drunkenness causing accidents, could avoid punishment and, thus, deterrence, by firing the driver before punitive damages are rendered and claim no deterrence was necessary. The policy of deterrence underlying punitive damages or punishment is not solely for the individual or entity engaging in the conduct but, rather, to prevent others from engaging in the same or similar conduct. For purely policy reasons concerning the safety of the public, a company that engages in conduct causing death and disease in 70,000 people should not be able to claim avoidance of punishment and deterrence because one plaintiff received punitive damages for *his injuries*. The argument of the defendants makes a mockery of deterrence, fairness and justice for innocent and unknowing workers. For these reasons, Texas law has always recognized the right of an individual to seek punitive damages when the conduct of the defendant is grossly negligent. Texas law provides fundamental fairness in the adjudication of a claim for punitive damages and safeguards concerning the amount of damages awarded.

The Fifth Circuit recently denied these very same argument in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), stating:

Each of these plaintiffs also has a right to seek punitive damages for Celotex's willful and intentional failure to warn about the dangers of asbestos. *There is no principle in law limiting the recovery of punitive damages to the first claimant.* (*Glasscock*, at page 24.)

Clearly, no violation of the Constitutions of the United States or Texas has been demonstrated. This very argument has repeatedly been urged and denied in Federal Court and certiorari denied by the United States Supreme Court. Consequently, this Point of Error should be denied.

C. *Texas Law Provides Sufficient Due Process Safeguards for the Imposition of a Punitive Damage Award.*

Respondents would, again, respectfully urge that the failure of the Petitioners to challenge the award of punitive damages as excessive precludes consideration of this Court of a challenge to the sufficiency of those guidelines or their application to this award. Nevertheless, Respondents will demonstrate that Texas law has sufficient safeguards and provides for fundamental fairness.

The Texas common law method of assessing punitive damages has previously been reviewed by the Fifth Circuit Court of Appeals and the United States Supreme Court in the context of a due process challenge. In *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.428 (1991) (see attached Appendix 2 for applicable portions of Celotex Petition for Writ) and in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), Slip Opinion at p. 25, Celotex's challenge to constitutionality of the Texas law was denied. Texas common law has embraced the traditional common law approach for assessment of punitive damages.

As the United States Supreme Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1990):

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the Trial and Appellate Courts to ensure that it is reasonable . . .
>
> . . .Since every State and Federal Court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

Id., at 1042, 1043.

In *Haslip*, the Supreme Court analyzed the procedural protections that safeguarded and guaranteed the due process rights of the defendant. These procedural protections included objective criteria for the imposition of punitive damages in the form of Trial Court instructions and jury findings, post-trial review by the Trial Court and appellate review of the excessiveness of the award.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the absence of a specific finding of actual damages. *Nabours v.*

Longview Savings & Loan Association, 700 S.W.2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Third, if the award is challenged for excessiveness, the Trial Court, and Appellate Court must review the award of the jury for excessiveness. In making that review, the Trial Court and the Appellate Court *must* consider at least the following factors: 1) the nature of the wrong; 2) the character of the conduct involved; 3) the degree of culpability of the wrongdoer; 4) the situation and sensibilities of the parties; and, 5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.*, at 910. In addition, this Trial Court specifically reviewed by post-trial motions and affidavits the history of punitive awards as provided by some of the Petitioners. (Respondents have no way to verify the accuracy of the Petitioner's statements post-trial.) A comparison of these Texas standards with the standards in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, clearly demonstrates that the Texas common law scheme affords sufficient due process protections.

A complete review of this record demonstrates that the jury was given: 1) clear objective criteria for the imposition of punitive damages; 2) the full panoply of procedural protections; 3) instructions describing the purpose of punitive damages as punishment and deterrence; 4) the instructions required the jury to consider the character and degree of the particular wrong and that the award was no compulsory; 5) the Trial Court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review including the Petitioners' claim of multiple prior punitive damage awards; 6) the Appellate Court conducted a complete review of the evidence supporting the imposition of punitive damages and whether or not the amount of the award was reasonable utilizing established common law standards. Every possible due process safeguard and protection was afforded these Petitioners.

The Petitioners imply that the Alabama system is a precise model which must be adhered to for due process. The Fifth Circuit has rejected that precise argument in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991) at p. 30, wherein the Court stated:

> We get no indication from *Haslip* that the Court will scrutinize each State's procedure with Alabama as the precise model. The Court laid down the general requirements: limits on jury discretion and adequacy of post-trial review. *Texas meets those requirements.*

Clearly, Texas law provided for "fundamental fairness and safeguards in the award of punitive damages. The jury was fully and fairly instructed concerning gross negligence and the imposition of punitive damages. Even though this specific award has not been challenged as excessive, the Trial Court and the Court of Appeals completely reviewed the underlying evidence and the amount of the award utilizing traditional common law standards. Additionally, both the Trial Court and the Appellate Court reviewed the claims of the Petitioners that previous awards should prohibit the imposition of this award.

Clearly, the lower Courts, The Federal Courts and the United States Supreme Court have recognized that the recovery of punitive damages ia na individual right and that the awards are based upon specific individual harm and conduct of the Petitioners as it relates to specific individual harm. Consequently, this Point of Error must be denied.

D. *The Court of Appeals Properly Applied Texas Law in Affirming the Award of Punitive Damages Against Fibreboard.* (Reply to Fibreboard Point of Error I)

Although Fibreboard describes this Point of Error as a misapplication of law, actually, Fibreboard is improperly attempting to raise a factual sufficiency argument in this Point of Error. Article V, Sec. 6 of the Texas Constitution establishes that the Supreme Court does not have jurisdiction to consider Points of Error attacking the factual sufficiency of the evidence to sustain or overturn a fact finding. *Ames v. Ames*, 776 S.W.2d 154, 159 (Tex 1980); *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 253 (Tex. 1983). Throughout this Point of Error, Fibreboard does nothing more than weigh what it perceives to be conflicting evidence. Clearly, this is a factual sufficiency analysis and this Court should deny the Application for Writ of Error.

In spite of the holdings of the Texas Supreme Court, these Petitioners maintain that punitive damages can only be recovered where the plaintiff proves by direct evidence the defendant's subjective state of mind. The defendants continually attempt to eliminate the ability of a plaintiff to prove gross negligence by proof that "under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others." Clearly, under the evidence in this case, these defendants are guilty of gross negligence and conduct demonstrating a conscious and reckless disregard for the rights and safety of the consumers and users of their products.

In *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, (Tex 1985), the Texas Supreme Court unequivocally states that in order to recover punitive damages and sustain a finding of gross negligence, a plaintiff need not prove a defendant's subjective state of mind by direct evidence. A plaintiff may prove the defendant's gross negligence by either proving:

1. the defendant had *actual subjective knowledge* that his conduct created an extreme degree of risk; *or*

2. by providing that under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others.

Williams, 699 S.W.2d at 573.

As stated by the Texas Supreme Court, "thus, the test for gross negligence is both an objective and subjective test." The reason Texas law provides for this rule should be apparent. The plaintiff is not always capable of making the defendant tell the truth or admit knowledge of the risk. As the Supreme Court states, to require only *direct evidence* of a defendant's subjective state of mind would leave outrageous conduct unpunished. Therefore, "a mental state may be *inferred* from actions." *Williams*, 699 S.W.2d at 573. Clearly, in light of the evidence presented in this case, the jury could *infer* the mental state of these defendants. Clearly, under the evidence presented in this case, the conduct of the defendants was outrageous and should be punished.

The following evidence proves that under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others:

1. Testimony of Dr. Joseph Wagoner (SF, vol. II, p. 127-208; Vol. III,p. 209-356.)

2. Testimony of other manufacturers concerning their knowledge of the risk (SF,vol. V, p. 671; vol. V,p. 714-759; vol. V, p. 760-766; vol. V p. 767-793; vol. V, p. 794; vol. VI, p. 887; vol. VI, p. 1033-1071.)

3. Cross-examination of Dr. Clark Cooper--a consultant to Fibreboard and an expert called by the defendants (SF, vol. XI, p. 1850-1976.)

4. Cross-examination of Edward Torbohn, an employee consultant of Fibreboard (SF, vol. XII, p. 2165-2178.)

5. Answers to Interrogatories and Requests for Admissions of these defendants (SF, vol. II, p. 70.)

This testimony unequivocally proves that a reasonable person, under the surrounding circumstances, would have realized their conduct created an extreme degree of risk to the safety of others.

1. *TESTIMONY OF DR. JOSEPH WAGONER.*

Dr. Joseph Wagoner is a professional epidemiologist and biostatistician. An epidemiologist is a person who specializes in the study of disease causes and their effects upon individuals and the public in general or isolated groups of the public. SF, vol II, p. 128. Dr. Wagoner's qualifications are unparalleled in this field. He received his

Doctorate from the Harvard University School of Public Health in Boston, Massachusetts. SF, vol. II,p. 128. He is a former Director of the Division of Field Studies and Clinical Investigations for the National Institute for Occupational Safety and Health Department of HEW at Cincinnati, Ohio. SF, vol. II, p. 128-129. He served as Chief of the Division of Surveillance, Hazard Evaluation and Field Studies for the Department of Health, Education and Welfare at Cincinnati, Ohio. He has served in numerous other capacities, including Senior Epidemiologist in the office of Director of the National Institute for Occupational Safety and Health. SF, vol. II, p. 129. He is currently a Fellow of the New York Academy of Sciences, SF, vol. II, p. 130.

Dr. Wagoner's testimony begins by identifying the known risks of exposure to asbestos in the products of the defendants. Incidentally, the defendants continually assert their products contained only "small amounts of asbestos, ranging from 5% to 20%." The fact is, that all products which contain asbestos are composed of similar amounts of asbestos, except some cements and tape, which contain as much as 90% to 100% asbestos. Therefore, the testimony of Dr. Wagoner, as he demonstrates, *is* discussing products containing "small amounts of asbestos" and the *necessary risks associated with the use of those products.*

Dr. Wagoner testified that by the 1920's, asbestos was recognized as a disease causing mineral and was causing the disease, asbestosis. SF, vol. II, p. 137. He established that the asbestos-related diseases included pleural disease, asbestosis, lung cancer, mesothelioma, cancers of the gastrointestinal tract, and heart disease. SF, vol. II, p. 138-140. He agrees with the estimation that *tens of thousands of workers will die* of asbestos-related cancer in the next half century. Furthermore, that 45% to 50% or nearly *half of all asbestos workers* will die of some form of cancer. In addition to these workers, many of their family members, housewives and children, will die from inhaling asbestos from the work clothes of these men. SF, vol. II, p. 143-144. The dangers and risk of disease and death due to exposure to asbestos fibers released when the products are used, are very real dangers and supported by the published literature. SF, vol. II, p. 144.

Dr. Wagoner explained that between 1927 and 1930, it was established with a certainty that asbestos causes asbestosis. SF, vol. II, p. 146. For purposes of these plaintiffs, that was over 20 years before their initial exposure. Asbestosis is scarring of the lung tissue itself, resulting in damage to the small airways where the oxygen-gas exchange takes place. The disease is recognized as a progressive, irreversible disease, without cure. In its later stages, it requires oxygen support and, ultimately results in a suffocating death. Asbestos was suspected to cause lung cancer by 1935, and was known as a probable cause of lung cancer during the time frame of 1939 through 1948. SF, vol. II, p. 146. For purposes of these plaintiffs, that was approximately 2 to 15 years before their initial exposure. Asbestos was suspected to be a cause of mesothelioma by 1943. Sf, vol. II, p.146. Again, for purposes of these plaintiffs, approximately 7 years before their initial exposure. Mesothelioma is an absolutely fatal form of cancer. Death generally occurs from 12 to 15 months of diagnosis. Asbestos is the only known cause of pleural mesothelioma in adults. SF, vol. II, p. 147.

Dr. Wagoner's testimony then focused on the available world literature concerning the dangers of asbestos from 1931 until the present time. SF, vol. II, p. 148. He specifically testified, and demonstrated with hundreds of articles, that it was a *known* risk in the literature in the 1930's that workers, *people using the end products*, were at risk for lung cancer and asbestos disease. SF, vol. II, p. 149. The review of publications by Dr. Wagoner included medical, scientific and industrial journals that were published throughout the United States and world. For example, *Safety Engineering*, an industry publication, in 1931 contained an article by a Mr. Wilson, President of Wilson Products, Inc., entitled "The Very Least an Employer Should Know about Dust and Fume Diseases." Mr. Wilson states in 1931 that "under the circumstances, (nature of the diseases) that exposure to asbestos *in any form and in every operation in which it is used, is dangerous*. SF, vol. II, p. 149. Another example which demonstrates the risk and the true tragedy of the "asbestos story" is *Industrial Bulletin*, published in 1934 by the Industrial Commissioner of the State of New York, which stated:

> It is quite probable that the disease resulting from the breathing of asbestos dust will be similar to that resulting from silica. If this be so, *manufacturers* or *handlers of asbestos products* might begin here and now to prevent trouble because of the fact like silicosis, the *disease can be prevented*; *there is no cure*. SF, vol. II, p. 160.

Sixteen years before these plaintiffs were exposed, here is the *Industrial Commissioner* of the State of New York telling manufacturers of *asbestos products* to protect the consumer and user because all of this disease and death could have been prevented and there was no cure.

As Dr. Wagoner testified, the very same techniques and knowledge for prevention of these diseases that exists today, existed in the 1930's and were discussed in articles by Merewether and Andrews. SF, vol. II, p. 161.

One final example of the types of articles reviewed by Dr. Wagoner is an article published in 1949 in the ***Journal of the American Medical Association***, entitled ***Asbestosis and Cancer of the Lung***. In the article, they report that "since some 20,000 workers are employed in the asbestos producing industries in this country and Canada, and ***many thousands*** in various asbestos consuming industries, that "increased attention to this probable occupational hazard of cancer of the lung by the medical profession is desirable." This article dealt with cancer of the lung; the hazards of asbestosis had already been established for twenty years. These articles illustrate, along with the hundreds of other, that the industrial, scientific and medical communities recognized the risk associated with products containing asbestos prior to the initial exposure of any of these men. SF, vol. II, p. 173.

Finally, Dr. Wagoner testified that the knowledge of these dangers was available to industry in the 1940's before any of these plaintiffs went to work in the asbestos industry. SF, vol. III, p. 325. These articles were widely disseminated in professional journals and sent to manufacturers and were available in common libraries throughout the country. SF, vol. II, p. 154-155. These companies each had research staffs and corporate officials knowledgeable enough to know these articles existed. If these defendants had acted responsibly and warned these plaintiffs and thousands of others of the dangers of asbestos, this tragedy would have been avoided.

Clearly, Dr. Wagoner's testimony establishes that, under the surrounding circumstances, in light of all these articles and the research staffs of the manufacturers, that a *reasonable person* would have realized that their conduct in failing to warn created an extreme degree of risk to the safety of these workers.

2. *TESTIMONY OF OTHER MANUFACTURERS DEMONSTRATING THE KNOWLEDGE OF ASBESTOS DANGERS.*

In addition to the literature review by Dr. Wagoner, the plaintiffs demonstrated that other manufacturers knew of the dangers of asbestos products. Specifically, the plaintiffs offered the testimony of William Simpson and documents of Raymark Industries/Raybestos Manhattan; Dr. Kenneth Wallace Smith, Medical Director for Johns-Manville; Barry Castleman, demonstrating Saranac Laboratory testing and findings of Owens-Illinois; Dr. Thomas Mancuso, Medical Consultant to Philip Carey/Celotex; and, Richard Gaze, head of Research and Development for Cape Asbestos. Each of these men and the documents established, without question, that industry knew of the dangers of asbestos and that these defendants, acting as reasonable persons, would have realized the degree of risk to the safety of others.

a) *Deposition of William Simpson and Related Documents.*

A complete reading of the "Sumner Simpson papers" clearly demonstrates that two manufacturers of asbestos products knew and recognized the dangers of asbestos in the 1930's. More importantly, the letters clearly demonstrate that in the 1930's, the manufacturers were knowledgeable of the published literature in England and the United States. The Petitioners urge that these letters are not relevant because they discuss exposure to only miners or plant workers. However, in reading the letters, it is clear that they are not so limited but, rather, relate to the problems of asbestos dust in general. *Jackson*, 750 F.2d 1314 at 1318. The letters further demonstrate that these two manufacturers that were members of various trade associations, similar to the Petitioners here, were concerned for their own financial interest about the workers obtaining knowledge of the dangers of asbestos dust.

b) *Testimony of Dr. Kenneth Wallace Smith.*

Dr. Kenneth Wallace Smith was the former medical director of Johns-Manville, SF, vol. V,p. 718. He testified that John-Manville was a member of the Industrial Hygiene Foundation, along with many other companies. SF, vol. V, p.722. He testifies concerning the numerous papers that were published by that organization. He discusses studies that were performed at the Saranac Laboratories in the 1930's. SF, vol. V, p. 726-727. These early studies were conducted to find out any effect the inhalation of asbestos dust would have on the lungs of human beings. SF, vol. V, p.728. He recalls the studies performed in England in 1935 and that the studies were well-documented and available worldwide. SF, vol. V, p. 729-730. He testified that studies included civilian people, shopkeepers and people at home. He stated that the studies demonstrated that these "so-called civilian people are human beings, just like the workers," and that they had disease from inhalation of asbestos fibers. SF, vol. V, p. 729-730. He testified that he became knowledgeable with respect to asbestosis and its cause from the first day he joined Canadian Johns-Manville in 1944. SF, vol. V, p. 734. He testifies that it is the inhalation of the asbestos fiber which causes a change, scarring of the pulmonary tissue. SF, vol. V,p. 735. He also describes asbestos-containing products and how he observed them being used. He further stated that those workers using the finished products would definitely have the same hazards. SF, vol. V, p. 741-742. Dr. Smith's testimony clearly demonstrates that the publication of asbestos dangers was widely distributed and available to a manufacturer. His testimony also demonstrates that a manufacturer of products knew how its products were being used and that those workers were exposed to the dangers of the asbestos-related diseases.

c) *Testimony of Barry Castleman and the Saranac Laboratory Studies on Owens-Illinois Product, Kaylo.*

Barry Castleman authenticates documents that were introduced into evidence concerning studies performed on the Owen-Illinois product, Kaylo. The documents from Saranac Laboratories, beginning in 1948, demonstrate that in all of the animals "sacrificed after more than 30 months of exposure to Kaylo dust, unmistakable evidence of asbestosis has developed, showing that Kaylo on inhalation is capable of producing asbestosis and must be regarded as a potentially dangerous material." SF, vol. V, p. 765-766. The documents additionally warn the company to take adequate control measures for safeguarding exposed employees. SF, vol. V, p. 766. The Saranac Laboratory documents clearly demonstrate that studies were being performed on the effect of inhalation of asbestos fibers from end products and that the product must be treated as an industrial hazard. SF, vol. V, p. 766-767. Owens-Illinois was one of the other defendants in this trial. When this testimony is combined with the testimony of Dr. Kenneth Smith and the Sumner Simpson papers, it is clear that studies were performed by manufacturers at Saranac Laboratories in the 1930's and 1940's.

d) *Dr. Thomas Mancuso Testimony.*

Dr. Thomas Mancuso was a medical consultant hired by Philip Carey/Celotex, one of the Petitioners in this case. SF, vol. V, p. 772. He testified the company had been engaged in the manufacture of asbestos products for several decades, SF, vol. V, p. 772. He testified that the asbestos problem included everybody "who bought and used the product." SF, vol. V, p. 775. Dr. Mancuso reviewed the literature on the dangers of asbestos and furnished management with copies of some of the literature. SF, vol. V, p. 780. He also testified that he prepared an Occupational Health Program for Philip Carey/ Celotex that detailed the health problems of asbestos and made recommendations to them. Dr. Mancuso was fired after submitting the program. Again, Dr. Mancuso's testimony demonstrates the availability of literature and the knowledge of dangers associated with the use of asbestos products. His study occurred in the early 1960's.

e) *Testimony of Richard Gaze.*

Richard Gaze worked as chief scientist for Cape Industries, a South African company engaged in the mining of raw asbestos. He held a chemistry degree and began employment in 1940. He testifies that he knew of the dangers of asbestos from his first day of employment. He testifies the dangers include disease and death. He also testified that precautions had to be taken in handling not only raw asbestos, but also end products. He specifically testifies that he met, on several occasions, with corporate officials of Pittsburg Corning Corporation prior to their entering into the asbestos-containing product. At the beginning of this trial, Pittsburg Corning was also a defendant. Dr. Gaze's testimony clearly demonstrates the world-wide scope of the knowledge and danger.

3. *CROSS-EXAMINATION OF DR. CLARK COOPER.*

Respondents demonstrated that the world literature available to a manufacturer clearly establishes the danger of asbestos in products to the user of the product. Additionally, the testimony and documents of other manufacturers clearly demonstrates that this literature was known, reviewed and that the knowledge of the dangers of asbestos were recognized by the manufacturers of asbestos products. Respondents contend that this testimony unquestionably establishes that "under the surrounding circumstances, a reasonable manufacturer would have realized that his conduct created an extreme degree of risk to the safety of others. The cross-examination of Dr. Clark Cooper, one of the witnesses called by Garlock on behalf of the Petitioners, clearly demonstrates the Respondents' position.

Dr. Clark Cooper has been a consultant to Fibreboard and Garlock. SF, vol. XI, p. 1852-1853. He was first contacted by Fibreboard/Pabco in 1968 or 1969. SF, vol. XI, p. 1853. He was contacted by Garlock in 1983. SF, vol. XI, p. 1852.

Dr. Cooper testified that b y 1927, asbestosis was a recognized disease. SF, vol. XI, p. 1873. By 1946, he stated, "of course, it was a well-known industrial disease by then." SF, vol. XI, p. 1880. He states that there is no question that knowledge that the disease, asbestosis, was being caused by asbestos was certain by 1930. SF, vol. IX, p. 1884.

Dr. Cooper confirmed that as of September 1, 1947, that asbestosis was a compensable on the job disease in the State of Texas. He was asked, "this means that somebody with the state of the art knowledge knew that asbestosis was a dangerous occupational disease then, didn't they?" Dr. Cooper answered, "How could they not have known in 1947?" The initial exposure of each of these plaintiffs was approximately three years later.

Dr. Cooper testified that knowing that asbestos could cause a disease was enough of a warning flag to find out where and when it occurred. SF, vol. IX, p. 1896. By 1930, there was enough knowledge of the disease available to put a manufacturer on notice and that it was certainly something he (a manufacturer) should think about. SF, vol. IX, p. 1897. In the 1940's, the knowledge of asbestos causing asbestosis was certainly available to industry. SF, vol. IX, p. 1898. Dr. Cooper was questioned concerning the literature from 1931 to 1965 and agreed that "there is no occupation exempt" from the dangers associated with the asbestos products. SF, vol. IX, p. 1942. Finally, this exchange:

> Q. Doctor, would you agree with me that that's an absolutely mass of reported articles, editorials, case studies, medical studies, and everything coming all the way from 1931 in *Safety Engineering* till 1963, dealing with asbestosis and lung cancer in insulators and other similar workers? Won't you agree with that?
>
> A. Yes. There were a large number of case reports.
>
> Q. And that not just a red flag or a warning flag, that's just warning flag after warning flag after warning flag, isn't it?
>
> A. Yes, They certainly when piled up together and looked at together are impressive. SF, vol. IX, p. 1848.

Dr. Cooper was then asked about the testimony of these manufacturers and their knowledge. He was asked concerning Richard Gaze testimony in 1942 "that from the very first day I went to work, I knew that asbestos was dangerous and you had to take precautions." Dr. Clark replied candidly:

> A. I would have known it if I had had any responsibilities involving asbestos.
>
> Q. By 1942, if it'd been your responsibility for a company, you's have known the dangers, wouldn't you?
>
> A. I think I certainly would from what was known in 1942.

There cannot be a more simple and honest statement of the truth from this, one of the defendants' expert witnesses. He had to candidly admit, as each of us would, that if it had been his responsibility, he would have known in 1942. That is objective proof that under the surrounding circumstances, a reasonable manufacturer would have known that his conduct created an extreme degree of risk to the safety of others. Dr. Cooper further admitted that even if the risk of asbestosis and cancer was one out two hundred, it would be an intolerable risk if it could be prevented. SF, vol. IX, p. 1958. As previously demonstrated, Dr. Wagoner testified that approximately 1 out of 2 or 50% of asbestos workers would die from a asbestos-related cancer.

4. *CROSS-EXAMINATION OF EDMOND TORBOHN.*

Edmond Torbohn began working for Fibreboard Corporation/Pabco in 1943. He testified the company had been in existence since the 1900's. He was a trained chemist with a master's degree from Stanford University. He testifies his education was equal to the education a chemist would receive in England. SF, vol. XII, p. 2165, 2166. In fact, it was established that he had the same training that Richard Gaze had received. He also worked as a plant manager. SF, vol. XII, p. 2167. He admits to knowing health problems of asbestos workers in the textile and mining industry in the 1950's. SF, vol. XII, p. 2168. He admits he knew that men like these plaintiffs were using their products, sawing them, cutting them, hammering them, fabricating and *breathing* the dust. SF. vol. XII, p. 2169. He reviewed product manuals and brochures placed into evidence and admitted there was not a single word of warning in the catalogs or literature of the dangers of asbestos. SF, vol. XII, p. 2173.

Fibreboard Corporation of "Pabco" admits it manufactured and sold products containing asbestos between 1940 and 1972 in the State of Texas. SF, vol. II, p. 115. The products sold by Fibreboard were various pipe covering insulation materials. (See Strong's testimony, SF, vol. II, p. 116. Fibreboard admitted that insulation applicators, helper or mechanics were foreseeable users of its products. SF, vol. II, p. 116. Fibreboard states that *no studies* were made by it concerning the effects of the inhalation of asbestos fibers on one using or being exposed to its products. SF, vol. II, p. 106. Fibreboard admits it conducted *no studies designed to minimize or eliminate the inhalation of asbestos fibers* by users of its products. SF, vol. II,p. 116-117. The plaintiffs testified that *no warning ever appeared on Fibreboard products*. Fibreboard claims it placed a warning in 1965. However, it offered no evidence of a box or any carton displaying the warning. The only evidence of a warning was a copy of a caution label. Fibreboard never warned of the dangers in the 1930's, 1940's or 1950's. It was highly disputed whether or not Fibreboard ever warned. The jury, having heard the testimony, was entitled to conclude that Fibreboard knew of the dangers and made a conscious decision not to test, study or warn of the dangers of its products.

Plaintiffs, by this evidence, have clearly met the test of *Williams v. Steves Industries*, 699 S.W.2d 570, concerning proof of gross negligence. Unfortunately, it is impossible for a plaintiff to make a defendant admit it had actual knowledge of the dangers of its products. The Texas Supreme Court, recognizing that reality, specifically provided a means for the plaintiff to prove gross negligence circumstantially. Plaintiffs demonstrated the "surrounding circumstances" of the development and dissemination of knowledge of the dangers of products containing asbestos and proved that Fibreboard had trained personnel on staff. As Dr. Cooper admitted, by 1947, how could they not have known?

The test of *Williams*, 699 S.W.2d 570, is would a "reasonable person" have realized that his conduct created an extreme degree of risk to the safety of others. Thousands of workers were dying; articles were being published world-wide; studies were being performed in the United States in the 1930's; clearly a reasonable manufacturer would have known of the risk.

The answer of these defendants is either we didn't know "our products" would cause harm or we relied on the industry standard threshold limit value. Both arguments fail. Why would there be an industry threshold limit value if there was no danger? This company had a duty to test and inspect its products. It did not. Even if it did rely on the TLV, any amount of care for the safety of workers using their products required that the manufacturer *warn of the danger and inform the worker to suppress the dust.* The honest truth is that this company made a *conscious decision* to ignore the danger, not inform the worker, and let thousands die and suffer from the use of their products. The "bottom line," as stated by the defendants, is that their conduct demonstrates they simply did not care.

The Court of Appeals, properly applying the test set out by this Court in *Williams*, 699 S.W.2d 570, evaluated the entire record and evidence and concluded that the jury had sufficient evidence to infer that this company had knowledge of the dangers of asbestos. The Court states specifically:

> From the surrounding circumstances, the jury had sufficient evidence to infer that Fibreboard's decision not to warn the users of the dangers of its products was made with *conscious indifference* to the potential injuries to the users and that this conduct created an extreme risk. *Pool*, 813 S.W.2d 658 at 690.

Finally, Fibreboard argues that the Texas common law system violates due process according to *Haslip*, 111 S.Ct. 1032 (1991). Respondents would reurge their argument concerning the adequacy of the common law method previously discussed. Clearly, this Point of Error must be denied.

E. *The Court of Appeals Properly Reviewed the Evidence as to Flintkote and Affirmed the Punitive Damage Award.* (Additional Reply to Flintkote II.)

Respondents would reurge the arguments previously made under C and D above concerning the due process arguments and review of the evidence to establish the surrounding circumstances. Once again, the Court of Appeals reviewed the standards set out by *Williams*, 699

S.W.2d 570 (Tex. 1985), and the evidence, and concluded that as to Flintkote there was sufficient evidence to support the jury's findings of gross negligence.

By Request of Admissions and Answers to Interrogatories, Flintkote admitted that it was in the business of manufacturing asbestos-containing products from 1940 to 1972. SF, vol. II, p. 120. Flintkote admits its products were sold and distributed in Texas. SF, vol. II, p. 120-125. Prior to 1970, Flintkote did not have anyone in the company whose job it was to go to areas where its products were being used or installed to make a dust level count. SF, vol. II, p. 123. Flintkote admitted that it had *never conducted any studies concerning the effects of the inhalation of asbestos dust* or fibers on one using its products. Flintkote does admit to being a member of *various industry organizations that may have conducted studies*. SF, vol. II, p. 123. Flintkote admitted that it had *never conducted any studies* concerning the effects of the inhalation of asbestos dust or fibers on one using its products. Flintkote admits it had a *research department that was established in the 1940's* and has operated continuously since that time. However, it *has not conducted any research concerning the health effects of asbestos*. SF, vol. II, p. 124. Flintkote has *never recalled any of its products* containing asbestos, SF, vol. II, p.125, and has *never warned the users* of its products concerning the dangers. (Plaintiffs testified they had never seen a warning and Flintkote never denied or refuted the evidence.

Essentially, although Flintkote had a research department and was a member of various trade organizations, it made the conscious corporate decision not to study the harmful effects of asbestos, test its products, or warn of the dangers. As the Court of Appeals pointed out, Flintkote cannot point to any evidence that the levels of asbestos in its products met any standards. To the contrary, plaintiffs provided testimony that asbestos from its product when it became dry powders into dust and was inhaled by these workers. The medical testimony clearly established that inhalation of asbestos fibers created an unreasonable health risk. Furthermore, the record is filled with expert testimony, previously described, that a product that contains asbestos which emits fibers during use is dangerous and creates an extreme risk of disease and death.

Finally, Flintkote complains that the instructions given by the Trial Court were defective, ambiguous and perfunctory. (Flintkote Application for Writ of Error, p. 27.) However, nowhere in this record does Flintkote point to an objection to the instructions given by the Trial Court and the tender of an instruction by Flintkote in substantially correct form to preserve any alleged error. Texas Rule of Civil Procedure 278 clearly states that the failure to submit a definition or instruction shall not be deemed a ground for reversal unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment. The failure of Flintkote to tender any instruction waives any alleged error in the Court's instructions. Furthermore, the Trial Court's instructions and definitions were appropriate issues in personal injury cases. See 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 4.02 and 7.06.

Flintkote, additionally complains of post-verdict review for excessiveness of the punitive damage award. However, as previously mentioned, Flintkote did not raise any Point of Error before the Court of Appeals or in its Motion for Rehearing that the award of punitive damages was excessive. Nevertheless, the Court of Appeals specifically reviewed this award utilizing the *Alamo*, 616 S.W.2d 908 (Tex. 1981), factors. Having failed to preserve any such error, this Court lacks jurisdiction to review the excessiveness of the award. Clearly, as to Flintkote, this Point of Error must be denied.

XVI. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S JUDGMENT AGAINST GARLOCK UNDER STRICT LIABILITY FOR ACTUAL DAMAGES BECAUSE THE EVIDENCE ESTABLISHED THAT GARLOCK KNEW OR SHOULD HAVE KNOWN OF THE DANGERS OF ITS PRODUCTS, THAT THE GARLOCK PRODUCTS WERE DEFECTIVE FOR FAILURE TO WARN AND THAT THE GARLOCK PRODUCTS CONTRIBUTED TO CAUSE THE PLAINTIFFS INJURIES. (Reply to Points of Error; Garlock I, II, III.)

The Court of Appeals specifically addresses Garlock's products and the appropriate authorities at *Pool*, 813 S.W.2d 658 at 687-688. The Court of Appeals correctly cites case authority and the application of the record to that authority and unequivocally finds sufficient evidence to support the jury's findings.

There are numerous incorrect statements by Petitioner, Garlock, in its brief concerning the record and Opinions cited by the Court of Appeals. However, initially, in considering these Points, the standard of review of a "no evidence" Point of Error must be reurged. Garlock attempts a complete retrial and re-weighing of its evidence before this Court.

This Court does not have jurisdiction for Garlock to make a factual sufficiency of evidence argument. Garlock has lost that argument twice, once before a jury and once before the Court of Appeals. The factual sufficiency of the evidence argument has ended and most of Garlock's Brief concerns that type of argument.

This Court, in deciding a "no evidence" challenge, must consider *only* the evidence and inferences tending to support the finding and *disregard* or *ignore* all evidence and inferences to the contrary. If there is any evidence of probative force to support the jury finding, then this Point must be overruled. *Garza v. Alviar*, 395 S.W.2d 821 (Tex. 1965). Instead of attacking the Court of Appeals Opinion under the appropriate standard of review, Garlock, in great detail, recounts its evidence and inferences opposing the jury findings and ignores Respondents' evidence that supports the jury's findings. Furthermore, Garlock continually mixes decisions that combined design defect allegations and failure to warn allegations and confuses the separate and distinct causes of action.

Garlock's products were properly identified and proven defective by Dr. Wagoner, Charles Kimball Flint, Charles Strong, and Dr. Clark Cooper. Garlock's Brief on this issue demonstrates an unfortunate lack of understanding of the fundamental difference between a strict liability/design defect case and a strict liability/failure to warn or marketing defect, such as this, case. No allegation was made by the plaintiffs of a design defect. No evidence was ever offered to prove a design defect. The utility of a product and the balancing of utility and risk apply to design defect cases, not marketing defect or failure to warn cases. In a marketing defect case, it is assumed the product has utility. Nevertheless, the risks associated with the product are such that it is unreasonably dangerous if unaccompanied by an adequate warning. The cases cited and quoted by Garlock, *Gideon* 765 F.2d 1129 (5th Cir. 1985) and *Dartez*, 765 F.2d 456 (5th Cir. 1985), contained allegations of both design and marketing defects. The language cited by Garlock from these opinions related to the Court's discussion of the design defect allegation, not the failure to warn or marketing defect allegation. It is imperative, in reviewing the evidence of product defect, that the principles and elements of strict liability/failure to warn be understood.

A. STRICT LIABILITY FOR FAILURE TO WARN.

Under Texas law, a manufacturer of a defective product may be liable under the theory of strict liability in tort as expressed in **RESTATEMENT (SECOND) OF TORTS § 402A (1964)** *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, (Tex. 1964). Section 402A provides, in relevant part, that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for physical harm thereby caused to the ultimate consumer or user."

The bedrock authority in an asbestos case if the Texas diversity opinion of *Borel v. Fibreboard Paper Products Corp.* 493 F.2d 1076 (5th Cir. 1973). In discussing the failure to warn cause of action, the Fifth Circuit quoted comment (j) to section 402A, for the underlying principle that a seller has a responsibility to inform users and consumers of dangers which the seller either knows or should know at the time the product is sold. *Id.* at 1088. *See also*, *Dartez*, 765 F.2d 456 (5th Cir. 1985), at 461 in response to Garlock's assertion that the Court of Appeals has changed the law in these cases. The Fifth Circuit in a Texas diversity case holds, "Dartez was required to establish that the dangers of asbestos were reasonably foreseeable or sufficiently discoverable *at the time of his exposure* before these defendants could be found liable. The Court of Appeals *does not* establish a post-sale duty to warn, as fabricated by Garlock. Under the facts of these cases, an;y distinction between time of sale or exposure is inconsequential because the events coincided and the evidence establishes that each of the manufacturers knew or should have known years before any of the Respondents began working in the asbestos trade and prior to the sale of the products. As pointed out by Garlock on p. 8 of its Application, the time period of the plaintiffs' *exposure* in these cases sets the "time frame within which it must have had the requisite knowledge." In determining whether or not a danger is reasonably foreseeable, the manufacturer is held to the knowledge and skill of an expert. The manufacturer's status as an expert means that, at a minimum, he must keep abreast of scientific knowledge, discoveries, and advances, and is presumed to know what is imparted thereby. *Id.* at 1089. A manufacturer has the absolute duty to test and inspect his product. Furthermore, a product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal *Id.* at 1090.

Asbestos is a known toxic and poisonous substance when the fibers are released in the air and inhaled by human beings. It is recognized to be the cause of disease and death through the asbestos-related diseases of asbestosis, many forms of cancer and mesothelioma. As early as 1931, it was reported in *Safety Engineering*, and numerous scientific and medical publications, that exposure to *asbestos in any form and in every operation in which it is used, is dangerous*. SF, vol. II, p. 149.

It is the position of the plaintiffs that any product that contains asbestos is "unavoidably unsafe" if the foreseeable use of the product results in airborne release of asbestos fibers. Dr. Wagoner, in his testimony, traces the scientific literature from 1898 to today, demonstrating the thousands of articles that warn of the dangers of breathing asbestos fibers. SF, vol. II, 127-208. Under Texas law, it has been held that if a product contains toxic or dangerous ingredients not obvious to the typical user, the manufacturer's duty to know of the danger and issue an appropriate warning is virtually absolute. *Muncy v. Magnolia Chemical Co.*, 437 S.W.2d 15 (Tex. Civ. App. - Amarillo, writ ref'd n.r.e.). Similarly, *Borel*, 493 F.2d at 1088, quoting comment (k) to section 402A of the Restatement, held that "unavoidably unsafe products" are those which, in the present state of human knowledge, are incapable of being made safe for their ordinary and intended use. The failure to give adequate warnings in these circumstances renders the product unreasonably dangerous. *Borel*, 493 F.2d at 1089.

B. EVIDENCE OF THE DANGERS OF ASBESTOS IN PRODUCTS.

Plaintiffs demonstrated through numerous medical and scientific articles beginning in 1898 and expert testimony, the dangers of asbestos and that there was *no safe level of exposure to asbestos*. SF, vol. II, p. 137, 143. Asbestos is a known cause of, not only asbestosis, but also many types of cancer, including lung cancer, including lung cancer, stomach cancer, esophageal cancer, and mesothelioma. SF, vol. II, p. 142. Consequently, it has been published in the Federal Register, and the World Health Organization has concluded that there is *no safe level of exposure to asbestos*. SF, vol. III, p. 322, 327-328.

In 1931, Dr. Wagoner testified, *Safety Engineering* published the following concerning the dangers of asbestos:

> We do know, however, that breathing of dust under the following conditions is seriously harmful; *asbestos and every operation in which it is used*. SF, vol. III, p. 335.

Dr. Wagoner further detailed hundreds of articles that dealt with the dangers of asbestos in many operations, including gasket material and packing. To dispute this evidence, the Petitioners attempt to rely on threshold limit values. Their entire argument misses the point of a failure to warn case.

Threshold limit values (TLV's) were initially industry's values. SF, vol. III, 325. The proposition is that *if* asbestos dust is kept below the threshold limit value, then no disease will develop. However, as reported by the New York Academy of Sciences in their discussions, such a limit has no scientific basis whatsoever. SF, vol. III, p. 327. Even Garlock's expert, Dr. Clark Cooper, admitted during questioning by Garlock that "there was no standard." There was a guideline recommended by ACGIH. He states, "They carefully did not use the word standard." Garlock, by footnote on p. 7 of its Brief, would have this Court believe that it established in this record "government regulations." As Dr. Cooper's testimony demonstrates, there was no regulation or standard at the time of exposure of these men in the 1950's and 1960's. SF, vol. X, p. 1803. (In the 1970's, Dr. Cooper did testify that OSHA for the first time had regulatory power and "said, oh, we'll just take this ACGIH twelve and two, two-million particles per cubic foot, and twelve fibers per cc, and we'll just adopt that." He continues, saying, "There was an immediate outcry, people said, "That's not a strict enough standard." SF, vol. X, p. 1807.) Dr. Cooper, in discussing these guidelines and the lowering of the guidelines, states:

> That number is great for the books, but the thing that prevents people from dust exposures are proper work practices and proper supervision. SF, vol. IX, p. 1829.

Proper work practices and supervision depend upon being warned of the risks associated with the products. Therein lies the very essence of a failure to warn case. The manufacturer has the affirmative duty to warn of the dangers associated with its products. Quite simply, Garlock never warned of the dangers associated with its products.

Assuming, arguendo, that such a limit existed, it does not defeat the plaintiffs cause of action or evidence. Garlock *never warned the user of the products to keep the dust level below any threshold limit value.* Garlock *never communicated to the worker or their employers that dust should be suppressed, that asbestos in the dust would cause disease and death. The very basis of the entire cause of action was that the information was never told to the consumer or user.* The entire TLV argument of the Petitioners is without basis or merit. The fact that Garlock, in 1982, 50 years after the dangers were known, in a *controlled test for litigation purposes*, demonstrates small amounts of asbestos fibers being released when its product is used, does not and cannot defeat the right of workers to know the risks associated with that asbestos fiber. SF, vol. X, p. 1797, 1799. Garlock's expert witness, Dr. Clark Cooper, never performed any tests on Garlock's asbestos products. SF, vol. XI, p. 1852.

Finally, the Petitioners argue that an agency of the federal government adopted its values and, thus, their products are not defective. Initially, it must be noted that none of these Petitioners tested for concentrations of dust in the actual field where these men used the products in the 1950's, 1960's and 1970's. Secondly, the defendant manufacturers, not the government, are charged with the responsibility of knowing the dangers and informing the consumer.

> Nor may a manufacturer rely unquestioningly on others to sound the hue and cry concerning a danger in its product. Rather, each manufacturer must bear the burden of showing that its own conduct was proportionate to the scope of its duty. *Borel*, 493 F.2d at 1090.

Additionally, in the New York Academy of Sciences, it was reported by a member of industry:

> The TLV's are industry's values, but industry generally does not develop anywhere near enough kinds and amounts of data that can be used to establish a TLV of a new substance, but industry has the sole responsibility to develop data on its own products. Government is not in a position to develop enough facilities to handle the problem in total, nor should it when reliable toxicological consultants are now available. SF, vol. III, p. 325.

Dr. Wagoner also testified, as a member of the committee that adopted the industry TLV's, that the standard was lowered. More importantly, he repeatedly emphasized that the government recommendation included not only suppression of dust below the TLV, but also, *that the TLV be coupled with worker education*, a *respirator program*, and *warning labels*. The Petitioners continually assert only part of the recommendation. The rest of the recommendation clearly requires *warning the consumer which is the basis of this lawsuit*. SF, vol II, p. 216.

Finally, the argument of Garlock completely ignores the nature of the asbestos diseases. All asbestos-related diseases are dose-response diseases. The concept of dose-response or exposure response is that the more exposure that you have to a substance, the greater chance of getting the disease. SF, vol. III, p. 210. The exposure to asbestos and the relationship to asbestos-related disease is cumulative. Thus, any exposure over a man's working career could have contributed to his overall condition. *Borel*, *Id.* at 1092. In fact, the medical testimony of Dr. Britton further establishes this relationship. Dr. Britton testified that in the medical literature of scientific literature it is established that just a small amount or small period of exposure, years ago, can be important as a disease producer. He further testifies that actually a brief exposure, perhaps one day, can stimulate some degree of process. SF, vol. III, p. 384.

C. GARLOCK'S PRODUCTS ARE DEFECTIVE.

As demonstrated by this testimony, products that contain asbestos are "unavoidably unsafe." The testimony of Dr. Wagoner clearly established that knowledge of the toxic and deadly nature of asbestos was known in the 1930's. Therefore, to prove the products of Garlock defective, it was necessary for the plaintiffs to prove the specific products manufactured by Garlock, utilized by the plaintiffs, contained asbestos, that asbestos fibers were released into air when the product is used in a foreseeable manner, and that the products failed to have a timely and adequate warning.

1. *Garlock Products were Used by the Plaintiffs and Contained Asbestos.*

Mr. Charles Strong testified that Garlock made three or four types of asbestos packing and gasket material that these men worked with at Texas Eastman. Mr. Strong positively identified from a Garlock product book, Garlock 257, Garlock 252, Garlock asbestos yarn and Garlock sheet gasket material. SF, vol. VII, p. 1148-1151. Mr. Strong also described the products and how he and the other plaintiffs used the material. He stated that these products were used at Texas Eastman in the '50's, '60's and '70's. He testified that these products manufactured by Garlock contained asbestos. SF vol. VII, p. 1148-1151.

Mr. Charles Kimball Flint, the purchasing agent for Texas Eastman, also testified concerning Garlock products. SF, vol. XV, p. 2720. Mr. Flint testified that he had purchased products from Garlock that contained asbestos. SF, vol. XV, p. 2788. He testified that he remembered purchasing *compressed asbestos sheet packing* and *square braided asbestos packing* that would be used for *sealing joints* and *for packing pumps or packing valves*. SF, vol. XV, p. 2789. He also testified that the asbestos sheet packing was a gasket material that had to be cut to be used and was used in all the buildings in Texas Eastman, "plant-wide." SF. vol. XV, p. 2801-2802.

Obviously, completely contrary to Garlock's assertions in its Brief, these men testified to use of specific Garlock products that contained asbestos in the 1950's, 1960's and 1970's. Plaintiffs, Freeman, Strong, Sledge and Pool worked together at Texas Eastman, used the same products in the same manner. SF, vol. VII, p. 1114-1115.

2. *Garlock Products Released Asbestos Fiber when Used in a Foreseeable Manner.*

Mr. Charles Strong specifically testified that Garlock products had to be replaced and when being replaced, were dusty. SF, vol. VII, p. 1152. In the process of removing the old worn out packing material, it was necessary to scrape it, beat it, and pull on it. SF, vol. VII, p. 1152-1153. He further testified that this work was performed throughout the years he worked at Texas Eastman. SF, vol. VII, p. 1153. He also described cutting the gasket material many times with pocket knives and machines and every time it was cut, asbestos dust and fibers were released. SF, vol. VII, p. 1106-1107, 1153.

Clearly, it is foreseeable by the manufacturer of packing and gasket material that gasket material will become dry, worn out and have to be replaced. Garlock knew its products were used in refineries and large plants and is charged with knowing the foreseeable use, application and removal of its products. *Borel v. Fibreboard Paper Corp.*, 493 F.2d 1076 (5th Cir. 1973). Garlock has never asserted that these men were not using their products in a foreseeable manner.

Garlock *incorrectly states that Dr. Wagoner did not testify concerning the dangers of asbestos in this type of product or used in this manner.* Dr. Wagoner, referring to articles published in *1932* and *1935* discussing conditions under which *asbestosis* was known to occur, found that the people were working with "*packing and joining.*" SF, vol. II, p. 156-157. He continued citing publications, in 1960 where the diseases asbestosis and associated cancers were found in people working as "*asbestos packer*" and "*unpacker.*"

Clearly, sufficient evidence was presented concerning the release of asbestos fibers from Garlock products when used in a foreseeable manner and the association of asbestos-related disease with the use of this type material.

3. *Garlock Failed to Warn.*

Mr. Strong and all the plaintiffs testified that there was not a warning on any box of insulation used in Texas Eastman. SF, vol. VII,p. 1111. He further testified that no one from Garlock ever gave him any kind of warning concerning the dangers of asbestos. SF, vol. VII, 1158.

Finally, Mr. Flint, the purchasing agent for Texas Eastman, testified that he had never received any type of warnings or instructions concerning products containing asbestos. SF, vol XV, p. 2786-2787.

D. SUFFICIENT EVIDENCE EXISTS IN THE RECORD THAT EXPOSURE TO GARLOCK PRODUCTS IS A PRODUCING CAUSE OF PLAINTIFFS INJURIES.

As previously demonstrated through the testimony of Dr. Wagoner and Dr. Britton, sufficient evidence exists to support the jury finding that exposure to Garlock's products was a producing cause of the plaintiff's injuries. Dr. Wagoner described the dose-response nature of asbestos-related disease. SF, vol. III, p. 210. Dr. Britton testified that a small amount of exposure, even for a single day, can stimulate some degree of the disease process. SF, vol. III, p. 384. All doctors agreed that it is the cumulative exposure over many years that causes the asbestos-related diseases.

Garlock cites as authority, *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985). Counsel for these plaintiffs also represented at trial and on appeal, Mr. Gideon. The *Gideon* facts and record are different and distinguishable from these cases as it relates to product defect. Garlock correctly notes that *Gideon* was reversed as to Raymark's products. However, Garlock ignores the record testimony in *Gideon*.

Mr. Gideon did not testify that *he ever used a Raymark product*, but that for the most part, he carried, loaded and sometimes relabeled Raymark products. He did not testify that *any dust* was created when he handled Raymark products. Mr. Gideon claimed to have only cut one Raymark product, one time. Furthermore, he testified that when he cut the sheet into gasket material, no dust was created. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985), at 1144. The plaintiffs in this case proved use and dust from specific Garlock products. The plaintiffs' evidence established that Garlock products were used "plant-wide" from the 1950's to today.

In *Gideon*, there was no evidence that Gideon's inhalation of a relatively small amount of asbestos fibers was a substantial factor in causing his condition. *Id.* at 1145. Plaintiffs in this case provided testimony of Dr. Britton concerning the effect of inhalation of asbestos, even in small amounts. Plaintiffs also established substantial exposure to asbestos fibers from Garlock products used throughout the plant over a 30 year period.

Finally, Garlock quotes *Gideon*, 761 F.2d at 1144, for the statement that "compliance with such government safety standards constitutes strong and substantial evidence that a product is not defective." This quote is made by the Court pursuant to a *factual* sufficiency argument. Respondents don't suggest that compliance is not some evidence of no defect, but it does not *conclusively establish* the fact. In fact, the Fifth Circuit specifically refused to hold exposure to levels of asbestos from Raymark's products foreclosed the issue of product defect and producing cause. The Fifth Circuit wrote:

> We reach this conclusion only on the record before us and do not hold that such proof might not be possible in another case.

The fact is, Raymark repeatedly had judgments rendered against it after *Gideon* to such an extent it has now declared bankruptcy.

Finally, as authority, Garlock cites *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985). Again, Garlock ignores the facts of *Dartez*, which were virtually the same as *Gideon*, 761 F.2d 1129. Dartez testified that he had limited use of asbestos cloth manufactured by Raymark.

Unlike the plaintiffs here, Dartez testified that he wrapped asbestos cloth around fittings and joints, but never stated that he *cut* asbestos cloth or *that his use of this cloth produced dust*. *Dartez*, 765 F.2d at 470. Similar to *Gideon*, 761 F.2d 1129, the Court observed that Dartez offered no evidence that limited exposure could be a producing cause of his injuries. *Dartez*, 765 F.2d at 471.

In contrast to the *Gideon* and *Dartez* cases, the plaintiffs in this case elicited specific testimony, as demonstrated, on each of the missing facts in *Gideon* and *Dartez*. The jury, obviously, had to resolve the conflict in the evidence between the parties. Sufficient evidence exists in this record to support the jury findings against Garlock. Consequently, these Points of Error must be overruled.

APPENDIX D

NO. D-1376

IN THE SUPREME COURT OF TEXAS

NO. 06-90-00014-CV

FIBREBOARD CORPORATION, et al
Petitioners,
(CONSOLIDATED)
v.
REUBEN S. POOL, et al,
Respondents.

NO. 06-90-00022-CV

FIBREBOARD CORPORATION, et al
Petitioners,
(CONSOLIDATED)
v.
LESSIE L. WILLIAM, et al,
Respondents.

RESPONSE TO MOTIONS FOR REHEARING
FILED BY THE PETITIONERS

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NO. D-1376

IN THE SUPREME COURT OF TEXAS

FIBREBOARD CORPORATION, et al
Petitioners,
(CONSOLIDATED)
v.

REUBEN S. POOL, et al,
Respondents.

FIBREBOARD CORPORATION, et al
Petitioners,
(CONSOLIDATED)
v.

LESSIE L. WILLIAMS, et al,
Respondents.

RESPONSE TO MOTIONS FOR REHEARING
FILED BY THE PETITIONERS

TO THE HONORABLE JUDGES OF SAID COURT:

Respondents file this Response to the Motions for Rehearing filed by the Petitioners and move that the Motions for Rehearing be denied. The Petitioners do not urge a single new or different basis for reversal of this Court's November 11, 1992, Order dismissing the Court's Writ of Error as having been improvidently granted. The Court, having fully considered the Petitioners' arguments and having already heard oral argument, should deny the Motions the Rehearing.

I.

Punitive Damages.

Owens-Illinois and Celotex urge this Court to create either a new procedure for consideration of prior awards of punitive damages or remand this punitive award to the Trial Court for consideration of prior awards. The fact is that each of these defendants did receive post-verdict review of prior awards by the Trial Court through post-verdict motions. Furthermore, the record at argument before this Court disclosed that each had paid only one punitive award. Texas law did provide these Petitioners with adequate review, meeting the tests of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). The precise constitutional arguments made by these Petitioners have been previously reviewed and considered by the Fifth Circuit Court of Appeals and Certiorari was refused by the United States Supreme Court in *King v. Armstrong World Industries, Inc.*, 872 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236. Furthermore, these Petitioners have not asserted that this particular award was excessive or not supported by sufficient evidence.

Fibreboard now attempts to assert that it, in fact, did challenge the punitive damage award under a no evidence challenge. In fact, it did not do so but, rather, attacked this Court's Opinion in *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, (Tex. 1985), and the application of that Opinion by the Court of Appeals. A review of the Court of Appeals' Opinion and the *Williams* Opinion clearly demonstrates that the Court of Appeals correctly applied Texas law. These arguments were fully briefed and considered by this Court prior to its November 11, 1992 Order. No new or additional compelling reason is urged for a reversal of the Court's Order.

II.

Sumner Simpson Instruction

Again, Petitioners do not raise a single new argument concerning this issue. The standard of review concerning the giving of an instruction by the Trial Court is abuse of discretion. The Trial Court has considerably more discretion in submitting instructions and definitions than it has in submitting issues. *First State Bank and Trust Company of Edinburg v. George*, 519 S.W.2d 198 (Tex. Civ. App. - Corpus Christi 1975, writ ref'd, n.r.e.)

The Fifth Circuit, sitting in Texas diversity cases, has uniformly held that this evidence is admissible and relevant on the issue of the knowledge available to the industry of the dangers of exposure to asbestos. *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) *cert. denied*, 478 U.S. 1022, 106 S.Ct. 339; *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236. The evidence was admitted without a limiting instruction in *Dartez*, *Jackson*, and *Gideon*. Petitioners argue that because Manville or Raybestos Manhattan were parties that those decisions are not applicable. That argument is not logical nor well founded. If a limiting instruction were necessary, it would be required whether or not Raybestos Manhattan or Manville were parties. The fact is, the Fifth Circuit has never adopted a rule requiring a limiting instruction for this evidence.

Finally, the limiting instruction tendered by the Petitioners was improper, and overly broad. As evidenced by final argument for Respondents, there was no confusion concerning this evidence. Furthermore, again, the Petitioners do not challenge before this Court the factual sufficiency of the evidence supporting this verdict.

III.

Autopsy Photographs.

The admission of these photographs was fully reviewed by the Court of Appeals, fully briefed and argued before this Court. Petitioners do not urge any new authority or arguments concerning this evidence. The Petitioners have not asserted that the award of the jury was excessive or improper. As Justice Phillips observed during oral argument, this entire issue is moot.

The petitioners, from the beginning of the trial, contested and disputed the involvement of asbestos in the deaths of Mr. Freeman and Mr. Williams. These photographs were specifically relevant to the asbestos disease process involved in these men. They clearly demonstrated the extent of the disease and, coupled with the testimony of a Board Certified Pathologist, proved the disputed issue of asbestos causation of disease. As previously stated in Respondents' brief, under Texas law, the general rule is that pictures or photographs which are relevant to any issue in a case are admissible. Likewise, it has been held that gruesomeness of a photograph does not render it inadmissible. *Texas Employers' Ins. Assn. v. Crow*, 218 S.W.2d 230 (Tex. Civ. App. - Eastland 1949), *affirmed*, 221 S.W.2d 235 (Tex. 1949).

IV.

Garlock

The basis for Garlock's Motion for Rehearing is a no evidence challenge to the finding of product defect for failure to warn. Garlock, like the other Petitioners in their motions, does not make a new argument but, rather, reasserts the argument previously rejected by this Court. Garlock's attempt to reweigh the evidence for factual sufficiency is improper under the no evidence standard of review. Specific evidence, as detailed in Respondents' Brief in Response to Applications for Writ of Error, was produced on each element of Respondents' cause of action. The Court of Appeals exhaustively reviewed that evidence and found it sufficient. Similarly, this Court, having already reviewed and decided this issue, should deny Garlock's Motions for rehearing.

V.

Petitioners summarily re-urge the remainder of the Points of Error included in their Applications for Writ of Error without argument or new authority. Obviously, these issues have been previously considered by this Court and should not new be reconsidered.

Respondents respectfully move that this Court deny each of the Motions for Rehearing filed on behalf of the Petitioners.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that a true copy of this Response was mailed by United States mail, postage prepaid, to all counsel of record on the 2nd day of December, 1992.

/s/ Jamie Kyle
JAMIE KYLE, CLAS